IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 442

RANDOLPH PHILLIPS,
Petitioner,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

and

BRIEF IN SUPPORT OF PETITION

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Dated: November 14, 1947.

APPEAL PRINTING CO., INC., 129 CEDAR ST., NEW YORK, WO 2-2242

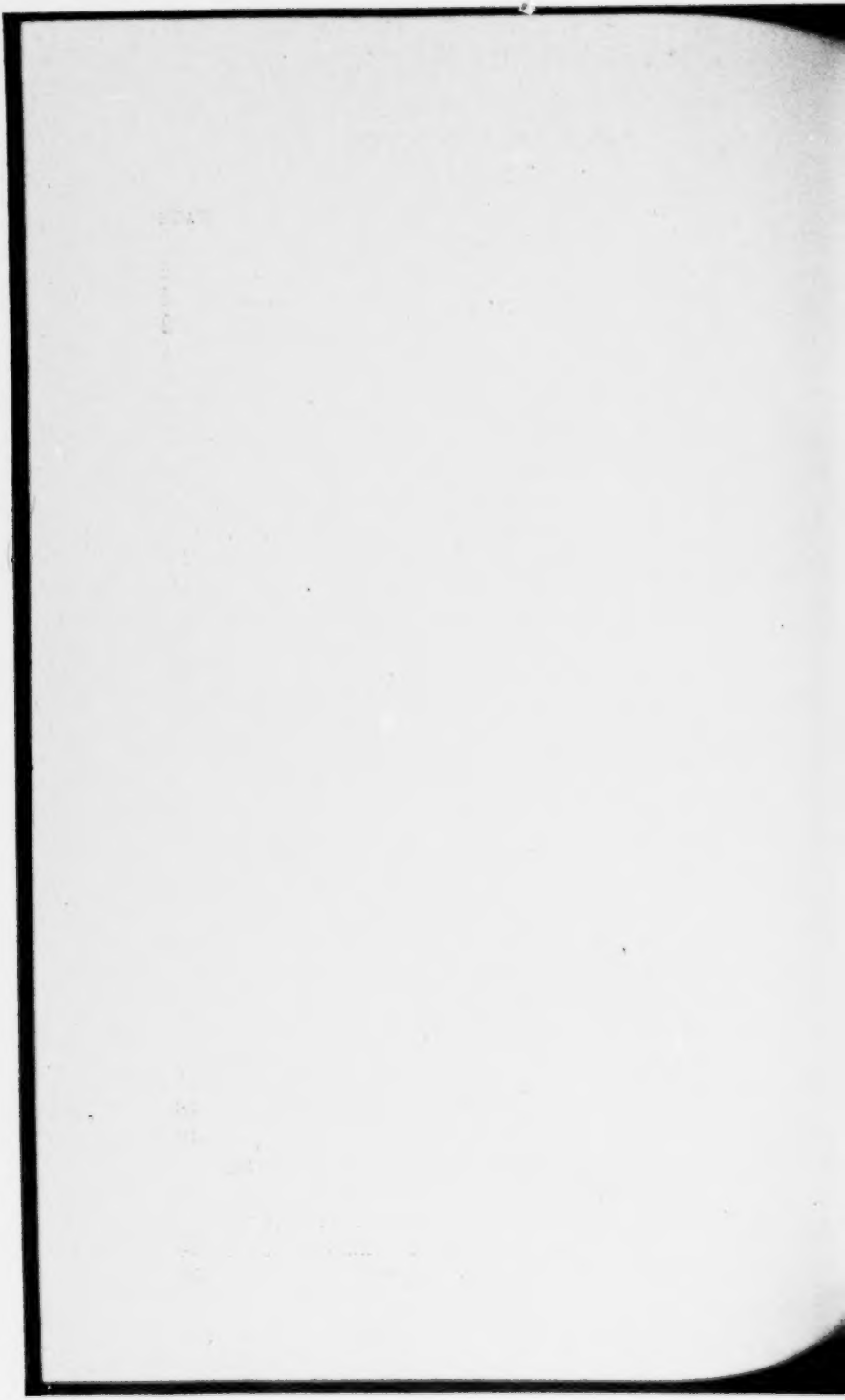

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Administrative Decisions

Miscellaneous

TABLE OF ABBREVIATIONS

Petitioners have moved the Court to dispense with the printing of the record for the purpose of considering this petition. The following reference symbols are used in this petition and the attached brief:

T. plus a page number = the page of the unprinted transcript of the Record on which the final decree of March 13, 1946 was based.

2T. plus a page number = the page of the unprinted transcript representing the record on the motion to vacate the decree, except Appendix A thereto.

Sen. plus a page number = the page of Appendix A to the motion, being the printed transcript of the hearings before the U. S. Senate Committee on Banking and Currency.

PX. plus a page number = Exhibits of the Baltimore & Ohio Railroad Company, the page number being the place where they appear in record of exhibits.

OX. plus a page number = Exhibits of petitioner herein.

B & O = The Baltimore & Ohio Railroad Company.

RFC = Reconstruction Finance Corporation.

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CORRECTIONS

PAGE	LINE NO.	CHANGE	TO READ
4	12	on	or
8	22	57	19
19	19	T. 375	T. 378
21	10	T. 260	T. 263
23	20	T. 477-480	T. 480-483
29	1	T. 244	T. 247
30	4	T. 429	T. 432
32	Last	T. 473	T. 475
33	10	T. 241	T. 245
39	9	T. 3449	*Id.*, p. 3449
39	23	T. 260	T. 234
41	23	T. 387, 431	T. 388-390, 433
42	12	T. 260	T. 234
44	28	T. 475	T. 477
44	30	T. 243	T. 247
49	6	T. 1990	Sen. 468
58	11	T. 511	T. 510
58	33	Assets	assents
62	32	intervenor.	intervenor (OX. 21, p. 3472).
62	29, 34	this Court	the District Court
63	13	this Court	the District Court
65	9	T. 431	T. 433
68	25	1933	1944
76	31	April 20	April 21
76	33	April 21	April 22
76	35	Sen. 755	Sen. 704-5

decree of the special three-judge United States District Court for the District of Maryland entered in this cause on September 17, 1947 denying a motion to vacate on the ground of fraud the decrees of said District Court dated July 11, 1945 and March 13, 1946 finding that respondent's petition under Chapter XV of the Bankruptcy Act had been filed "in good faith" and otherwise approving a plan of reorganization filed pursuant to said petition.

Opinions Below

The order and opinion of the District Court denying the motion to vacate has not been reported and is printed at page 79, *infra*. The opinion finding the petition to have been filed "in good faith" and approving the plan is reported at 63 F. Supp. 542 (T. 1549).

Jurisdiction

The order of the District Court denying the motion to vacate was entered September 17, 1947 (p. 79, *infra*). The jurisdiction of this Court is invoked under Section 745 of Chapter XV of the Bankruptcy Act (11 U.S.C. 1245).

Questions Presented

1. Did the trial court err, in view of the following uncontroverted facts, in refusing to vacate its prior finding that the filing of the bankruptcy petition was not "inspired or stimulated", was made "without collusion" and met the statutory requirement of "good faith"? The trial court originally found that the position of the Reconstruction Finance Corporation (RFC) was "the dominant fact in this case" and that on the basis of testimony by RFC and B & O officials a petition in bank-

ruptcy was filed "in good faith" and was not "inspired or stimulated" by B & O. Subsequently, it was discovered at a Senate investigation of the "bankruptcy" that the B & O's Financial Vice-President originated and suggested secretly to the RFC the conditions previously found by the trial court to have been imposed by RFC as creditor without "inspiration or stimulation" from B & O officials of RFC. The Vice-President by perjury and suppression of evidence in the District Court had concealed the true origin of the bankruptcy proceedings and his drafting of RFC's letter. The conditions set out in the letter admittedly formed the basis of the petition in bankruptcy. At the Senate investigation the Chairman of the RFC admitted that the B & O was not in need of reorganization prior to the time he signed RFC's letter, which had been secretly drafted by the B & O Vice-President, in which RFC "imposed" the conditions in question, and which the court had been led to find were not "inspired or stimulated" and were made "without collusion."

2. Do the eighteen specific acts of false testimony, suppression of evidence, alteration of records, attempted intimidation and harassment of opposing parties, diversion of funds, misstatements of financial condition, obstruction of justice, and other specified malpractices now revealed constitute a fraud upon the Court?

3. Are the uncontroverted facts of record, as supplemented by new evidence discovered by the Senate investigating committee, consistent with the conclusions of law by the District Court that (a) the B & O petition in bankruptcy was filed "in good faith", and (b) that the B & O was "unable" to meet its debts to the RFC?

4. Assuming that a plan of reorganization has been too completely executed to be upset without injury to innocent persons, is a court of equity powerless to grant defrauded creditors any remedy against a management as individuals and Common and Preferred Stockholders as a class now enjoying the fruits of the fraud?

5. Did the refusal of the trial court to hold a hearing on the motion to vacate the decree and on the new evidence tendered by affidavit in support thereof and its failure to require the accused parties to answer the sworn allegations and its acting on the motion and making findings thereon without notice to the parties on opportunity for submission of briefs constitute an abuse of judicial discretion?

Statute Involved

The pertinent provisions of Chapter XV of the Bankruptcy Act are:

> "SECTION 710. Any railroad corporation not in equity receivership or in process of reorganization under Section 77 of the Bankruptcy Act * * * may file in the United States district court in whose territorial jurisdiction such railroad corporation has had its principal executive or principal operating office during the preceding six months or a greater period thereof, its petition averring that it is unable to meet its debts, matured or about to mature, and desires to carry out the plan of adjustment.
>
> * * *
>
> "SECTION 714. The special court, after hearing, promptly shall enter an order approving the petition as properly filed under this chapter if satisfied that such petition complies with this chapter

and has been filed in good faith, or dismissing such petition if not so satisfied.

• • •

"SECTION 725. If the special court shall find—

• • •

"(5) that the petitioner has not, in connection with said plan or the effectuation thereof, done any act or failed to perform any duty which act or failure would be a bar to the discharge of a bankrupt, and that the plan and the acceptance thereof are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act • • •

"Said court shall file an opinion setting forth its conclusions and the reasons therefor and shall enter a decree approving and confirming such plan and the adjustment provided thereby, which decree shall be binding upon the petitioner and upon all creditors and security holders of the petitioner • • •."

Statement of Matter Involved

There are no issues of fact raised by this petition. The only issues relate to whether the District Court drew proper conclusions of law from the new record in this case, made by consolidation of the record on which the final decree was based with the mass of new evidence presented on the motion to vacate the decree on the ground it had been procured by fraud. The record on the motion includes 755 pages of documents and oral testimony representing in large part new evidence discovered by the Committee on Banking and Currency of the United States Senate which investigated the B & O-RFC relationships at hearings held in April and May, 1947.

A statement of the facts and the issues of law is set forth in the brief attached to this petition.

Chronology of the Proceedings

On July 2, 1945 the B & O filed in the District Court for the District of Maryland a petition under Chapter XV of the Bankruptcy Act alleging that it was "unable to meet its debts matured or about to mature" and seeking approval of a plan of reorganization (T. 2). The debts were identified as some $84,563,276 in secured 4 percent notes, of which $13,490,000 principal amount were due on August 1, 1944 and $71,073,276 on November 8, 1944. Prior to filing the petition in the District Court the B & O had obtained the approval of the Interstate Commerce Commission, as required by Chapter XV and Section 5 of the RFC Act, to the issuance of the new securities proposed by the reorganization plan (261 ICC 51; 261 ICC 211).

The ICC was not required to pass on the "good faith" or the fairness and equity of the plan. (See *Delaware & Hudson R.R. Co.*, 254 ICC at pp. 240-241.) A hearing was held on July 10-11, 1945 before a special three-judge court composed of Circuit Judges John J. Parker and Armistead M. Dobie and District Judge W. Calvin Chesnut. Petitioner herein opposed the filing of the petition on the ground that it was not made "in good faith", as required by statute, and that the alleged "bankruptcy" had been artificially contrived and was "a synthetic crisis". The court by order entered July 11, 1945 (T. 111) found however the petition to be filed "in good faith" but left final determination of the question open for adjudication at a hearing on the merits scheduled for September 17, 1945. Prior thereto Circuit Judge Parker was removed from the court by virtue of a presidential appointment to the War Crimes Commission sitting at Nuremberg, Germany, and Circuit Judge Morris A. Soper replaced him as presiding judge.

On September 17-21, 1945, inclusive, hearings on the merits were held. The petition and plan were approved in an opinion dated November 20, 1945 (T. 1549; 63 F. Supp. 542) and confirmed by the final decree dated March 13, 1946 (T. 1936). On June 10, 1946 a petition for writ of certiorari filed in this Court by petitioner was denied (328 U. S. 871). A petition for rehearing was denied on October 14, 1946 (329 U. S. 821). The Senate investigation was held in April and May, 1947, and its record published in August, 1947. On September 3, 1947 petitioner moved in the District Court that the final decree be vacated on the ground it had been procured by fraud and offered the Senate record in evidence (2 T. 2-32). Petitioner also asked for a hearing on the motion, presenting an application for an order to show cause (2 T. 38-9). The motion was denied on September 17, 1947 (p. 79, *infra*), the application being ignored, without hearing and without the District Court's requiring B & O or RFC to answer the sworn allegations of the motion with its detailed recital of the Senate record. The present petition is for review of the order denying the motion.

The statutory requirements, the prior proceedings before the ICC, and the details of the reorganization plan together with an analysis of its prejudicial effect on the securities owned by petitioner are set forth at pages 9 through 22 of the petition for writ of certiorari filed in May, 1946 (No. 1220, October Term, 1945).

Reasons for Granting the Writ

1. The ruling of the trial court in refusing to vacate the decree is in direct conflict with the duty imposed on the courts to vacate decrees that have been procured by fraud, *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*,

322 U. S. 238. In that case the failure of defendant's counsel to reveal that one of them had been the author of an article signed by a labor leader and which in its disguised form aided in securing defendant an exclusive patent was sufficient to vitiate a decree obtained twelve years previously. In the present case the B & O's Financial Vice-President, who is also a lawyer, failed to reveal and in fact concealed by perjury his authorship of the crucial exhibit which expressed, in the court's language, "the dominant fact in the case" and led the court to believe that the exhibit had been written by the RFC's Chairman and was "without collusion" and not "inspired or stimulated" by any B & O official. RFC collaborated in this deception of the court, even going so far as to impose a ban of secrecy on its employees. (See pp. 39-40 of attached brief.)

2. The attitude of the trial court presided over by Judge Soper[2] was so peculiar and so indifferent to the plainest evidence of fraud, perjury, falsification of records and other malpractices as to constitute such a departure from the accepted and usual course of judicial proceedings as to require the supervision of this court. (See pp. 57 *et seq.* of attached brief.)

3. The requirement that a petition in bankruptcy must be filed "in good faith" and the acceptance of a readjustment plan procured by means that are "in good faith" is integral to all modern federal bankruptcy statutes, including Chapter X, Chapter XV (now expired) and Section 77 of the Bankruptcy Act. This Court has never

2. In the middle of the trial of the case, as petitioner learned later, Judge Soper made a laudatory speech about one of the B & O directors at a testimonial dinner to the Director (2 T. 51).

defined that requirement as a standard of conduct[3] and this case is believed to be the first one since the enactment of the modern bankruptcy statutes raising this issue in terms of fraud and collusion. The decision of the trial court encourages a low standard of good faith and is a striking departure from the decisions of this Court condemning collusive management plans and "friendly receiverships" in *Harkin* v. *Brundage,* 276 U. S. 36, 54, 55; *National Surety Co.* v. *Coriell,* 289 U. S. 426; and *First National Bank* v. *Flershem,* 290 U. S. 504. These decisions in the era preceding the enactment of Chapter X, Chapter XV and Section 77, set a high standard of conduct for those who seek the protection of courts in reorganization proceedings. This standard is in direct conflict with the low standard applied by the District Court in the present case, although the modern statutes were designed to elevate bankruptcy practices above those prevailing in the previous era.

4. The B & O is the largest railroad company to go into bankruptcy in the history of the United States. It is also the only major railroad system to go into bankruptcy twice within six years, the second time being in the midst of the most prosperous era of railroad earnings in its and the nation's history.

5. There has been no review of any of the trial court's findings and orders, although the rights of more than 100,000 creditors and stockholders with a claim to assets in excess of one billion dollars are affected by this case.

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3. It has hitherto defined it solely in terms of feasibility of effecting proposed plans of reorganization. A proposed plan which is manifestly impracticable may be dismissed because not filed "in good faith". *Fidelity Assurance Co.* v. *Simms,* 318 U. S. 608; *Tennessee Pub. Co.* v. *A.M. National Bank,* 299 U. S. 18; *Snyder* v. *Fenner,* 3rd Cir. 101 F. 2d 736.

Of 80,000 creditors, 41,000 did not assent to the plan. The statute under which the case was brought was drafted by B & O counsel[4] who, contrary to the practice in all other Federal bankruptcy statutes and statutes creating three-judge district courts, included no provision for at least one right of appeal. In these unusual circumstances the Supreme Court is asked to grant the petition in recognition of the Anglo-American judicial tradition that there should be at least one review of a trial court's findings, and that due process of law has in fact come to include in our federal judicial system by custom and practice at least one such review.

6. None of the evidence relating to the issue of fraud and collusion was before the Interstate Commerce Commission, whose role under the statute, unlike Section 77 reorganizations, required no findings on the good faith or the fairness and equity of the plan. The statute is so loose and weak in its protective provisions that the Securities & Exchange Commission opposed its enactment.[5] It has also been condemned by the commentators. In view of these facts a special scrutiny should be made by a superior court to enforce the minimum rights of protection provided creditors under the statute.

7. The entire Law Department of the railroad was relieved of any responsibility for the case because of the attitude of its senior lawyers. Two resigned from the B & O rather than be associated with it in the course of the "bankruptcy". A third B & O lawyer, then also a B & O director, wrote "Read with interest. Finis!" at

4. See S. Hearings on H.R. 5407, 76th Cong. 1st Sess. at 92,114 (1939).

5. The SEC was fearful that the statute, if enacted, would deleteriously affect "the principles on which Chapter X is founded" and called attention to its failure "to meet the standards of reorganization procedure" recommended by the Commission. *S. Hearing on H.R. 7121,* 77th Congress 2nd Session, 1942, p. .

the conclusion of a legal opinion that the B & O bankruptcy could only be instituted if the directors "ascertained and honestly believed" that the RFC would not extend its loan to B & O without a bankruptcy proceeding.

8. The chief actors in the conspiracy herein related are officers or former officials of the RFC, and associated persons, now in control of the B & O. RFC's debts are now "frozen" and "water-logged"; they are admittedly "unsalable" today except at a tremendous loss, while collateral rights previously held by RFC have been surrendered or gravely impaired. The size of the government investment in B & O and the placing of that investment in unnecessary jeopardy (pp. 66 *et seq., infra*) by these officials in order to entrench and secure the present B & O management's position raises peculiarly novel and significant questions about the standard of conduct required of government corporations. Since such corporations may play an increasingly important role in the future economy of the nation, it is of public importance that their officials maintain a high and rigorous standard of business conduct. To let the chief actors in this case escape without even a soft rebuke, as did the district court, will tend to encourage low standards in the conduct of public business.

9. Equity can be done in this case without injury to the rights of innocent persons. (See pp. 75 *et seq., infra.*)

WHEREFORE petitioner respectfully prays that this petition for a writ of certiorari be granted.

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Counsel for Petitioner.

Dated: November 14, 1947.

SUMMARY

See Table of Contents, pp. i, ii, *supra*, for summary of brief.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

POINT I

The District Court Applied Erroneous Standards of Law in Determining the Issues of Fraud and Good Faith.

There is no issue of fact in this proceeding. All the facts alleged in the 41 numbered paragraphs of the motion (2T. 2) to vacate the decree are admitted. The District Court found by order dated July 11, 1945 (T. 111) that the B & O petition in bankruptcy filed on July 2, 1945 was filed "in good faith". By its final decree dated March 13, 1946 (T. 1936) it found that "the plan and the acceptance thereof are in good faith and have not been made or procured by any means, promises or acts forbidden by the Bankruptcy Act" (T. 1946-7); and that "at and prior to the date of the petition" (July 2, 1945) the B & O "was, apart from the plan, unable to meet its debts matured or about to mature" (T. 1946). The motion alleged that the order, decree and opinion "were procured by fraud, concealment and deception" and "had the facts hereinafter alleged" been previously known to it the court "would not have been able lawfully to issue said decree, orders and opinion" (No. 6, 2T. 6).

The District Court refused to grant an application (2T. 38) for a show cause order, denied a hearing on the motion, failed to require any answer to the 41 allegations,

* The record, which exceeds 4,000 pages, has not been printed. This brief's length therefore is partly accounted for by the necessity for quotation from this unusually large record.

which were supported by a 755-page volume of Senate testimony and exhibits filed as Appendix A (Sen. 1-755) to the motion, and decided the motion without prior notice to the parties or affording any opportunity for argument or the submission of briefs. Yet it issued a written opinion (p. 79, *infra*) denying the motion and made therein findings of fact and law with respect to questions on which petitioner herein had no opportunity to be heard.

Specifically the lower court found (see Appendix):

(1) That the motion could not be sustained under Rule 59 (b) of the Federal Rules of Civil Procedure. (No attempt however was made by petitioner or is made here to sustain the motion under 59 (b).)

(2) That "the motion cannot be sustained under Rule 60 (b) * * * because the motion was not made within six months after the judgment was entered" and "cannot be sustained as a petition for leave to file a bill of review or an independent action under the concluding sentence of Rule 60 (b) * * *." It is pertinent to note that Rule 60 (b), as amended, abolishes bills of review and clearly states that "this rule does not limit the power of a court * * * to set aside a judgment for fraud upon the court". *Amendments to Rules of Civil Procedure*, 329 U. S. 863. Furthermore, as this Court observed in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, at page 244:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments, regardless of the term of their entry * * *. This equity rule (recognized) * * *

> the need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule."

(3) That "all the allegations of fact in the motion, when taken together and considered in the light of the testimony taken during the hearing of the case are insufficient to establish the charge of fraud or to justify the court in reopening the case and reviewing its decision".

We do not desire to linger on the question of whether the court abused its discretion in finding the pleadings insufficient without any opportunity for a hearing or briefs on that very point. The Rules of Civil Procedure clearly indicate we think the necessity for a hearing in view of the special District Court's failure to provide either "by rule or order for the submission and determination of motions without oral hearing" (Rule 78). Furthermore, the language of Rule 7 (b) (1) would seem to require that a hearing be held on a written motion, as existed in this case (2T. 2). Finally Rule 78 provides for opportunity, such as was denied petitioner, for submission "of brief written statements of reasons in support and opposition" if no oral hearing is held.

The basic question however is whether the conclusion of law is correct that the new evidence, discovered by the Senate Committee, when "considered in the light" of the prior testimony "is insufficient to establish the charge of fraud or to justify the court in reopening the case". The court, it should be noted, avoids the task of even outlining superficially the new evidence or suggesting its character and then comparing it with its previous findings. As will be shown hereafter it avoids dealing with the new facts because they cut the ground out from under its original opinion. There is, it should be noted, no

question as to the sufficiency of the new evidence factually but only as to the sufficiency of the pleading as a matter of substantive law to establish a charge of fraud or to justify reopening the case in *any* respect. The truth of the new evidence is admitted.

A. Background of Present Case.

Less than six years prior to the filing of the petition in the present case, a similar petition was filed by B & O under Chapter XV of the Bankruptcy Act. This petition sought to make effective a plan of adjustment which included extension of certain bonds and notes, including those owned by RFC, to the year 1944 or later, and the conversion of fixed interest on certain bond issues, including the Convertible 4½s, due 1960, which are again affected by the present plan, into contingent interest for an eight year period. The court approved the plan without modification. (29 F. Supp. 608; Cert. den. 309 U. S. 654.) In neither the 1939 plan nor the present plan were the contractual rights of the common or preferred stockholders altered, nor were their assents to the plan solicited.

The 1939 plan provided for extending until August 1, 1944 and November 8, 1944 obligations amounting to approximately $122,000,000, of which $85,000,000 was due to RFC for loans whose previous maturity dates were 1939-1942. As required by the statute, the court found that the 1939 plan was "feasible, financially advisable, and not likely to be followed by the insolvency of said corporation or by need of financial reorganization or adjustment" and that B & O's "inability to meet its debts matured or about to mature is reasonably expected to be temporary only" (PX. 8, sections 5.01, 5.02, 5.03; p. 165).

The court based these findings on the testimony of the B & O Senior Vice-President-in-charge of finances, George M. Shriver, that the maturities could be met from three sources (PX. 77, pp. 1760-6).

The first source he mentioned was "income in the future"; from 1940 to 1944 B & O earned net profits, *after taxes,* of more than $117,000,000 (Sen. 166). This is the highest income ever reported by the company for any 4-year period in its 120 years of existence (Sen. 166). Mr. Shriver's second source was "accretions from depreciation"; these have exceeded $64,000,000 for the period in question (PX. 42-47, inc., pp. 1559-1708). His third source was "the sinking fund"; since 1939 B & O accrued $67,000,000 in sinking fund and other monies available for debt retirement (PX. 92, p. 2240).

As Henry W. Anderson of Richmond, B & O's Chief Counsel in charge of the 1939 plan, wrote to B & O's General Counsel on September 25, 1944, when the present plan was proposed:

> "The expectation of the management as to the results of the operation of the 1939 plan and the improvement in the position of the company have been more than realized" (PX. 112, p. 2282).

Colonel Anderson thereupon refused to associate himself with the management during the pendency of the second "bankruptcy" and forthwith terminated his annual retainer as Special Counsel of B & O.

The background of this case would not be complete unless it were pointed out that of the 12 directors who were on B & O's board under the presidency of Daniel Willard prior to the 1939 plan, only 2 members remain today. By the fall of 1942, following the deaths in that

year of Mr. Willard and Mr. Shriver, the management of the B & O had become so reshuffled that four of its top executives were men formerly affiliated with the RFC or the Federal Loan Administration, and a fifth, the new president R. B. White, was appointed only after the incumbent management had received Jesse H. Jones' approval because, as one director testified, it would have been "unwise" not to obtain it and B & O's loan agreement required such approval (Sen. 608). The ranking executive of B & O since 1942 has been the former Deputy Federal Loan Administrator, Stewart McDonald, Chairman of the Executive Committee and RFC's nominee on the B & O board. The ranking financial executive is Vice President Russell L. Snodgrass, former RFC Assistant General Counsel. The second ranking financial executive until his promotion recently to the position of B & O's General Solicitor was F. L. Baukhages, former RFC attorney. In addition to McDonald as Chairman and White as ex officio member, the Executive Committee includes John C. Traphagen, president of the Bank of New York, and J. Hamilton Cheston, Vice President of the Philadelphia Savings Fund. The last two men became directors as part of the consideration to insurance company and savings bank groups for accepting the 1939 plan. The only remaining member of the Executive Committee and the sole representative from the pre-1939 Willard regime is Howard Bruce of Baltimore who was on leave of absence from May, 1942 to September, 1945. Thus the effective control of the road and especially its financial management from 1942 to date has been in the hands of the six individuals previously mentioned.

B. Falsification of the Record on the Origins of the 1944 Bankruptcy Plan.

B & O led the court below to believe that the present proceeding was forced upon it in 1944 by circumstances beyond its control. In fact, as was brought out before the Senate Committee the present proceeding and plan had been originated, considered, desired and prepared during the period from early 1942 to early 1944. The date sequence is obviously of importance in determining the issue of collusion.

At the initial hearings before the District Court Judge Parker stated that the following question "went into the very heart of the case".

> "In other words, the question is this, was the attitude of the RFC taken because the Baltimore and Ohio Railroad desired to readjust its debt or was the effort of the Baltimore and Ohio Railroad to readjust its debt caused by the position taken by the RFC?" (T. 375)

The B & O witnesses, President White and Vice President Snodgrass, and the RFC witnesses, former Federal Loan Administrator Jones and Chairman Henderson assured the Court that the attitude of the RFC produced the B & O plan and that it was not the B & O's desire or plan that produced the RFC attitude. On the basis of this unanimous testimony, the court found:

> "In this situation after unsuccessful efforts to refund the 1944 maturities through public marketing, the management of the Railroad *early in 1944* conferred with Mr. Jesse Jones, then Secretary of Commerce and Federal Loan Administrator and the former Chairman of the Reconstruction Finance Corporation, who had given special personal atten-

> tion to railroad loans, and who still had supervisory authority in the RFC, to ascertain whether the RFC would further extend the maturity of the 1944 obligations and if so, *on what conditions*. The railroad was advised that no extension would be made unless it could successfully secure a substantial extension of maturities of its large bond issues, maturing in 1948, 1950 and 1951. * * * Thereupon arrangements were made for a formal conference with Mr. Jones upon the subject at his office in Washington on May 12, 1944. At that conference attended by Mr. Jones and other members or representatives of the RFC, Mr. White, president, Mr. Snodgrass, financial vice president, and Mr. Clay, General Solicitor, and several directors of the B and O, Mr. Jones definitely and finally refused to further extend the loans *except on the stated conditions. In consequence thereof the Railroad then proceeded to formulate the present adjustment plan,* after conference with members of the legal staff of the RFC, and financial officers of some of the large institutional holders of B and O bonds * * *." (Italics supplied) (63 F. Supp. at p. 546.)

(1) Post-dating the "Genesis of the Plan"

It should be noted that the court found that the adjustment plan was formulated in 1944 "*in consequence*" of the position taken by RFC "early in 1944" and at the May 12, 1944 conference. The specific testimony of Vice President Snodgrass on this point follows:

> "* * * Following the interview with Mr. Jones on May 12, I then started negotiations with insurance company holders of our bonds, the representatives of the institutional holders, with discussion as to what kind of plan we should have, what in general should be the modifications in the interest of all security holders. We had a number of meetings in

New York and discussed our loan extensively. I had the assistance of Mr. Hagerty of the Metropolitan, Mr. John W. Stedman of the Prudential, Major Oliver representing the Mutual Savings Banks of the United States, and others, and we sat around the table and discussed the plan *before one word was written.*

"Q. Which resulted in your plan? A. *Those discussions were the genesis of the plan* • • •" (T. 260)

Vice President Snodgrass and President White could not but have known this testimony was false when given in view of the following evidence discovered by the Senate Committee and which clearly indicate the misleading character of the court testimony.

(II) PLANNING FOR THE 1944 "BANKRUPTCY" IN 1942

(i) An extract from the minutes of the B & O's Executive Committee Meeting on March 2, 1942 reads:

"General Financial Plan

"Mr. Traphagen stated with reference to the subject of a financial plan for the B & O progress had been made. He presented for discussion some of the conclusions thus far reached as to what might be done with *such a plan which includes proposed extension of 1944 and 1948 maturities* and will probably also require the *re-enactment of the so-called Chandler bill* or passage of like legislation to prevent small minorities from delaying or preventing the consummation of a favorable plan. There was long and earnest discussion on the subject, and Mr. Traphagen agreed to send the President *a copy of proposed plan* outlined by him for further study."

(ii) An extract from the minutes of the B & O's Executive Committee Meeting of May 4, 1942 reads:

> "The president stated that the so-called Chandler Act, as it is now proposed to be reenacted, is in substantially the same form as the original act except that it does not contain the time limitation included in that act.
>
> "There has arisen a question as to whether a plan along the lines suggested by Mr. Traphagen, which contemplates a substantial reduction in the principal of debt and total interest charges, would qualify under the proposed act * * *."

(iii) A letter dated May 20, 1942 written by J. C. Traphagen, director of B & O, to Cassius M. Clay, General Solicitor, reads in part:

> "Having in mind that after the 1944 maturities are dealt with the company shortly thereafter will be faced with the maturity of the first mortgage and a little later on with the Pittsburgh, Lake Erie & West Virginia 4s we thought it was highly desirable *to develop some plan of a general extension* of the road's obligations and at the same time put its debt structure in shape so that it could weather a period of lean times.
>
> "I do feel that *we could probably deal with the maturing notes in 1944 and the obligations to the RFC without great difficulty* but in 1947 the interest charges which are now contingent will again become fixed and in 1948, as stated above, we have the large maturity represented by the first mortgage 4s and 5s. It is my feeling that if we are going to work out *a plan of readjustment*[1]

1. "A plan of readjustment" is a characterization peculiar to Chapter XV, which does not use the Section 77 expression for railroad plans of "a plan of reorganization." (See p. 4, *supra*.)

which will put the B & O into condition to face the future with some assurance, *the time to deal with the security holders is when the road is faced with a problem, and that problem as I see it, is the maturing note issue as well as the RFC obligations in 1944.*

"Undoubtedly, *some plan to buy up the B & O 4 percent notes in anticipation of such readjustment is a matter of very real importance* * * *"

(iv) A statement was made by Snodgrass around July of 1942 that "the thing to do is to buy up as many of the bonds as you can, and then put the company through a McLaughlin Act proceeding". (A bill to re-enact the expired Chapter XV, known as the Chandler Act, passed in the House early in 1942 and became known as the McLaughlin Act, and was subsequently enacted by the Senate. Snodgrass in August, 1942 testified at a Senate hearing in support of the bill ostensibly as RFC Assistant General Counsel without revealing that he was then Vice-President elect of the B & O (T. 477-480).[2]

(v) A draft of the present plan of adjustment made by Snodgrass was given to Clay about the end of February, 1944, two and one-half months at least before May 12, 1944, the date after which Snodgrass testified negotiations began which were "the genesis of the plan" not "one word" of which "was written" prior thereto (PX. 134, p. 3370).

The above evidence (Sen. 442-3, 502) establishes "the genesis of the plan". It reveals the seven basic features of the plan:

2. Referring to this hearing, General Solicitor Clay testified: "A few days before that hearing I recall Mr. Stewart McDonald (the B & O Chairman) called me on the phone and asked me what I was doing about the hearing. I said 'nothing'. 'Well,' he said, 'We will get Russ * * * Mr. Snodgrass'" (Sen. 15).

(1) The 1944 maturities of B & O even though "we could probably deal with (them) without great difficulty" are to be used as the pivot for obtaining the jurisdiction of a bankruptcy court.

(2) This jurisdiction is to be obtained under a re-enacted bankruptcy act, Chapter XV, known in its first enactment as the Chandler Act and in its second as the McLaughlin Act.

(3) There is to be "a general extension" of the post-1944 maturities.

(4) The plan is to provide for "a substantial reduction in the principal of debt and total interest charges", in other words a sinking fund for debt retirement is to be created.

(5) "Interest charges which are now contingent will again become fixed (in 1947)" and must be made contingent again after 1947. This will put the company's debt structure "in shape so that it could weather a period of lean times".

(6) Prior to embarking on the second bankruptcy in 1944, "the thing to do is to buy up as many of the bonds as you can, and then put the company through a McLaughlin Act proceeding". "Some plan to buy up the B & O 4 percent notes in anticipation of such readjustment is a matter of very real importance."

(7) No changes in management or reduction in the stockholders' equity are previsioned in 1942, nor do they occur in the 1944 plan.

All seven of these basic provisions, each "formulated" in 1942 rather than after May 12th, 1944 as the court

stated in its decision, were realized in the 1944 plan. There is in fact no plan if these provisions and steps preliminary thereto are eliminated. All of these steps were provided for prior to the end of February 1944 when Snodgrass gave a draft of the plan to Clay. President White and General Counsel Cornwell who was also a B & O director during all this period made no effort to correct Snodgrass' testimony although they both had personal knowledge of its falsity as shown by the Senate evidence quoting the directors' minutes. The Senate record also completely destroys the testimony of Director Traphagen that "the Chapter XV proceedings were adopted only as a last alternative" (Sen. 681). The record shows they were the first alternative as well as the last. At no time has the B & O offered any minute or excerpt from a minute to show that the Board of Directors considered any other plan than the one specified in the quoted evidence.

In short, the court's findings on the question that "went into the very heart of the case"—the origin, date and reason for the plan, are now revealed to be in error.

C. Suppression of Evidence and Falsification of the Record with respect to "the Dominant Fact in this Case" —the position of the RFC expressed in the letter of April 6, 1944.

The lower court made the following findings on the issue of collusion:

> "In this situation, after unsuccessful efforts to refund the 1944 maturities through public marketing, the management of the Railroad *early in 1944* conferred with Mr. Jesse Jones, then Secretary of Commerce and Federal Loan Administrator and the

former Chairman of the Reconstruction Finance Corporation, who had given special personal attention to railroad loans, and who still had supervisory authority in the RFC, to ascertain whether the RFC would further extend the maturity of the 1944 obligations *and if so, on what conditions.* The railroad was advised that no extension would be made unless it could successfully secure a substantial extension of maturities of its large bond issues, maturing in 1948, 1950 and 1951. Despite this previously expressed attitute of the RFC it appears that some of the officers of the Railroad were uncertain whether the refusal to extend the 1944 maturities *except on the conditions indicated,* was final and unalterable. Thereupon arrangements were made for a formal conference with Mr. Jones upon the subject at his office in Washington on May 12, 1944. At that conference attended by Mr. Jones and other members or representatives of the RFC, Mr. White, president, Mr. Snodgrass, financial vice president, and Mr. Clay, General Solicitor, and several directors of the B and O, Mr. Jones definitely and finally refused to further extend the loans *except on the stated conditions. In consequence thereof* the Railroad then proceeded to formulate the present adjustment plan, after conference with members of the legal staff of the RFC, and financial officers of some of the large institutional holders of B and O bonds * * *

The objections to the plan as a whole do not attack its feasibility but only the alleged lack of necessity for any plan at all at this time. * * * More specifically, it is stated that the refusal of the RFC to extend its secured loans, by refunding or otherwise, except on the condition of the approval of the plan, is not due to the independent judgment of the RFC but was inspired by the officers of the B and O and is therefore really collusive * * *

It is bound up with the whole question whether the present position of the RFC is an *independently* taken one *based only* on the financial conditions applicable to the case, or whether it is *the result of inspiration and collusion* with officers and directors of the Railroad to create an only simulated or 'synthetic' financial embarrassment for the purposes of this case. This is a question of fact to be determined on the evidence.

Bearing on this issue, we have heard and considered the testimony orally given in open court and subject to cross-examination of all the principal persons now living having any knowledge of the subject, including Mr. Roy White, president of the B and O Railroad; Mr. R. L. Snodgrass, its financial vice president *largely in charge of the present plan;* Mr. Stewart McDonald, Chairman of the Road's Executive Committee; Messrs. Traphagen and Cheston, other members of the Board, and of Mr. Jones, former Chairman, and Senator Charles Henderson, present Chairman, of RFC. All of these witnesses *emphatically refute the suggestion that the past or present attitude of the RFC was inspired or stimulated by the officers of the B and O.* With equal clarity they assert that the position taken and maintained represents the independent judgment of the members of the RFC acting in the interests of the United States as a large creditor of the B and O, and having due regard to the interests of the public and of the security holders of the B and O. There is no *sufficient* evidence in the case to warrant a rejection of the testimony of these reputable witnesses whose general credibility is in no way attacked and their evidence not impaired by cross-examination. And we find nothing in the nature of the case inconsistent with this definitely asserted position taken by the RFC * * *

The dominant fact in the case is that the RFC did take this position * * *

> And the evidence is clear that the RFC early in 1944, took the position that it would not extend the loans unless there was a comprehensive plan for the postponement of these maturities.[17] * * *
>
> [17] See Petitioner's Exs. Nos. 65, 66, 67, 68, 69 and 70."

The foregoing excerpts are quoted from 63 Federal Supplement at pages 546, 555, 557 and 558. (Italics are supplied.)

When the lower court wrote this opinion it had no suspicion nor did the opposing parties that the Exhibit No. 68 mentioned in its opinion, the letter dated April 6, 1944 (PX. 68, p. 1750),[3] from RFC Chairman Henderson to Vice President Snodgrass, which expressed "the dominant fact in this case" and which was the occasion for the May 12, 1944 conference and the admitted basis of the subsequent petition in bankruptcy, had been drafted by Snodgrass.

The motion to vacate the decree alleged that James L. Homire, one of RFC's counsel, and W. W. Sullivan, chief of RFC's railroad division, "had copied the Snodgrass drafts for Chairman Henderson's signature" except for "insubstantial changes" and that the conditions stated in the letter "had been suggested and proposed to RFC by the financial vice president of the B & O" (Motion, Nos. 11, (xi), (xiii) and 13; 2T. 14, 16-7). These facts are not denied, nor can they be. The duplicity of Snodgrass in the District Court may be judged from his testimony that the conditions in the letter which he originated, suggested and drafted "were very disappointing to me

3. Printed at pages 37-8 of this brief.

at the time" (T. 244) he allegedly learned of them. It remained for the Senate Committee to discover the suppressed correspondence between Snodgrass and the RFC. Furthermore, other Senate testimony conclusively proves that RFC had no thought of forcing B & O to reorganize until Snodgrass so requested.

As a former RFC Assistant General Counsel specializing in reorganization and bankruptcy problems, no one could have been more alive than Vice President Snodgrass to the necessity of persuading the trial court that the RFC "independently" imposed, to quote the court's findings, without "collusion" or "inspiration or stimulation" by B & O, the conditions set forth in the letter dated April 6, 1944.[3] Snodgrass devoted every effort therefore to securing a strong paper record of refusal from the RFC to extend its loans unconditionally for the sole purpose of supporting a Chapter XV proceeding. To that end he wrote on March 14, 1944 a letter to Chairman Henderson of the RFC asking under "what terms and conditions" RFC would extend its B & O loans (PX. 67, p. 1759). The April 6th letter was a "reply" to this letter. On May 12, 1944 the B & O officials conferred with Jesse H. Jones with respect to the "conditions" set forth in the "reply". As later became clear, this conference was staged to enable the B & O officials to testify in court that the conditions were "final and unalterable." A memorandum of this conference, written by Snodgrass, was placed in the court record. It states: "Mr. McDonald (the B & O Chairman) opened the conference by referring to and summarizing my letter to (Chairman) Henderson of March 14 and * * * Henderson's reply of April 6, 1944. Mr. McDonald then said that it had

3. Printed at pages 37-8 of this brief.

appeared to the (B & O) Executive Committee that the only way to comply *with the conditions specified by the RFC* (in the April 6 letter), was a McLaughlin Act proceeding" (Parentheses and italics supplied) (T. 429). Thus we have the picture of Snodgrass knowingly drafting conditions with which "*the only way to comply* * * * was a McLaughlin Act proceeding".

The minutes of an RFC directors' meeting, submitted by RFC counsel to the District Court, recite that the imposition of "the conditions stated in the Chairman's said letter of April 6, 1944 resulted * * * in the filing of the plan of adjustment" (Sen. 130). That this April 6th letter, plus the March 14th letter of inquiry to RFC by Snodgrass, was to be the foundation for establishing the jurisdiction of the District Court is shown in another Snodgrass memorandum, dated April 15, 1944, to Governor Cornwell, head of B & O's Law Department, in which he stated "the two letters * * * *necessarily* form part of the basis of an adjustment plan proceeding" (PX. 136, p. 3388). In short, the April 6th letter was the most important single document introduced into evidence by B & O on the issue of good faith. It constituted B & O Exhibit No. 68 referred to in footnote 17 of the trial court's decision, and it expressed what the court correctly said was "the dominant fact in the case" (63 F. Supp. at p. 557).

It is vital to note that on March 14, when Snodgrass was writing the letter of inquiry as to the "terms and conditions" for an extension, RFC had not so far as any evidence shows decided to impose the conditions which the District Court was later to regard as forcing B & O's bankruptcy. Snodgrass testified before the Senate Committee:

"On the following day (March 15, 1944) in New York I saw the late Frank C. Wright, then assistant to the directors of the RFC. I should mention here that because of the fact that Mr. Jones had been hurt when hit by an automobile while in Houston for Christmas of 1943, he did not return to Washington until the end of January and after he did was not in physical condition to give much time to his duties and was not available to discuss our situation. I therefore conducted most of my RFC negotiations with Mr. Wright who, as I said, was then assistant to the directors, reporting directly to Mr. Jones on railroad matters.

"I took to New York with me on March 15 a copy of my letter of March 14, 1944, and discussed it with Mr. Wright. As I remember it he told me that as to exact terms the matter would be discussed with the Railroad Division of the RFC and later with Mr. Jones, but that their position was, as it had always been, that we had to put our house in order.

"Following that discussion, as I remember it, I prepared at his request the draft letter which was read into the record here the other day and gave it to him. After I gave him the draft we discussed the matter further and after my return to Baltimore I forwarded to him a second draft which likewise was read into the record here the other day.

"Thereafter I saw Mr. Wright in Washington once and maybe twice before we received the RFC letter of April 6, 1944. I told him that I was concerned about the delay in receiving an answer to the letter of March 14, and he told me that *they had not finally decided on the conditions that they would impose.* The RFC letter of April 6, 1944, stated those conditions" (Sen. 307-8).

This is the testimony of Snodgrass, read from a prepared statement, after the Senate Committee had dis-

covered the draft letters in the RFC files. The B & O official, it will be observed, no longer attributes to Jones or RFC the origination of the conditions which the court found were not "inspired or stimulated by the officers of the B and O."

Since Mr. Jones was not in Washington in January, 1944, and from the end of January until at least March 15, 1944 "was not in physical condition to give much time to his duties and was not available to discuss our situation", as Snodgrass told the Senate Committee, it is clear that he never suggested or originated the conditions which Snodgrass drafted for Wright and which the court ascribed to Mr. Jones.[4] The most Snodgrass dared claim at the Senate investigation in attributing the impetus for the bankruptcy to Mr. Jones was to allege indirectly that Mr. Jones had told him through Wright on March 15, 1944 that "their" position was that "we had to put our house in order". This was a remark which, if made, could have repeatedly been made to numerous RFC borrowers but which led only B & O to interpret it as a command for a bankruptcy proceeding. For instance, 41 of RFC's railroad borrowers "put their houses in order" without bankruptcy proceedings by paying off their RFC debts in full or by bond refinancing (Sen. 171). That this general language was not intended by RFC to require a B & O reorganization in bankruptcy is also made clear by the fact that at the time the remark was allegedly made RFC had outstanding an offer to lend B & O an additional $6,500,000.

4. An attempt to pre-date the Snodgrass conversations with Jones on this question to the year 1943 was specifically rejected by the District Court as will be noted by the language of its opinion placing the start of the negotiations with RFC at "early in 1944". Mr. Jones in fact testified in the District Court on cross-examination that he did not recall any conversation with any officers of B & O "prior to 1944" as to how it should meet its debts to the RFC (T. 1294). Snodgrass himself testified in the District Court that it was in 1944 that Mr. Jones took the position attributed to him (T. 473).

Although at the May 12, 1944 conference Mr. Jones reaffirmed on behalf of the RFC the conditions stated in the April 6th letter, he was reaffirming a position theoretically negotiated at arm's length by his staff but in fact adopted collusively by them. He was, moreover, not a member of the RFC Board of Directors. As Snodgrass testified, "Mr. Jones, as Secretary of Commerce, had supervision of one of the agencies, the RFC. Of course, he had no more authority on the Board than I have. He was not a member" (T. 241). The RFC directors alone could legally bind the RFC.

The fact of the matter is that the RFC did not consider the B & O in need of reorganization and made no move toward that end until after Snodgrass successfully planted the idea as indicated above.

On February 19, 1944, RFC had offered to lend B & O an additional $6,500,000 in a letter from Chairman Henderson to Snodgrass. RFC by the terms of its statute was unable to lend to a company in need of reorganization.[5] Thus this offer to lend B & O money on February 19, 1944 has an especial significance. This was underlined during the hearings before the Senate Committee:

> Senator Tobey. So it was your judgment as late as February 1944 that the B & O was not in need of judicial reorganization?

5. If B & O had sought ICC approval of the loan of $6,500,000 new money, and ICC certification that it was not in need of reorganization, this would have had to be obtained prior to August 1, 1944 when the notes came due for which the money was needed. (It was only needed, it should be noted, because of the diversion prior thereto of $31,500,000 to purchase of debts maturing after 1944, see pp. 47-8 of this brief, *infra*.) Since the necessary assurances of acceptance of the plan required by Chapter XV had to be obtained prior to any ICC action on the plan, B & O needed many months to complete the plan's details and obtain these assurances. Thus the ICC certification required under Section 5 of the RFC Act (as then amended) would, if given without the plan, force the ICC to find prior to August 1, 1944 that no reorganization was needed. To avoid this embarrassment B & O borrowed in May, 1944 $6,500,000 privately, and delayed asking for ICC approval of its plan until January 1945 and then obtained the certification that no further reorganization would be necessary if the plan were effected (261 ICC 211).

Mr. Henderson. Let me see that.

Senator Tobey. I think you will affirm that. The answer is "Yes" is it not?

Mr. Henderson. Yes.

Mr. Henderson was thereafter asked the obvious question:

Senator Tobey. When did you change your opinion sir, about the need for the reorganization, the second reorganization?

Mr. Henderson. That was later (Sen. 58-9).

There is no evidence that in the forty-five days between February 19, the date of RFC's offer to lend new money, and April 6, the date of its supposed forcing of B & O to reorganize under the bankruptcy laws, the B & O finances had deteriorated. In fact it had earned additional net profits and showed every sign of continuing its high earning power.

(1) The Missing Links Found by the Senate Committee

The missing links between February 19 and April 6, 1944 were found by counsel for the Senate Committee in the two truckloads of RFC files which it had ordered to be submitted to it for examination. They consist of three communications from Snodgrass of B & O to Frank Wright, now dead, but then assistant on railroad affairs to RFC's Chairman Henderson. These letters are the draft letters previously mentioned, which were dated March 15 and March 17, 1944 respectively. The first, dated March 15, on which was written in hand "First Draft", reads as follows:

"First Draft"

"We have your letter of March 14, regarding the extension of your company's notes held by this Corporation.

"Your company's notes in the principal amount of $71,071,381, maturing November 8, 1944 and the $13,490,000 of indebtedness of your company to this Corporation, maturing August 1, 1944, which we agreed to extend in order to enable your company to pay its indebtedness to the public maturing on the latter date, will be consolidated and considered as one indebtedness.

"In order to enable your company to have an opportunity to work out its financial problems, this Corporation will, subject to the approval of the Interstate Commerce Commission, extend all of your company's indebtedness to this Corporation for a period of time to be hereafter determined, but not beyond , on condition that at the same time certain of the obligations of your company held by others are extended and modified satisfactorily to this Corporation.

Yours very truly,

____ ____,"

(Sen. 71).

Subsequently, there was added to this letter in the handwriting of W. W. Sullivan, Chief of RFC's Railroad Division, "See second draft". The second letter, dated March 17, stated simply:

"Dear Mr. Wright:

Please substitute the enclosed for the paper I gave you in New York Wednesday evening.

Sincerely,

RUSSELL"

(Sen. 71).

The "enclosed", with the handwritten heading "Second Draft" was as follows:

> "We have your letter of March 14, regarding the extension of your company's notes held by this corporation.
>
> "Your company's notes in the principal amount of $71,071,381 maturing November 8, 1944 and the $13,490,000 of indebtedness of your company to this Corporation, maturing August 1, 1944, which we agreed, subject to the approval of the Interstate Commerce Commission, to extend in order to enable your company to pay its indebtedness to the public maturing on that date, will be consolidated and considered as one indebtedness.
>
> "In order to give your company a further opportunity to work out its financial problems, this Corporation will, subject to the approval of the Interstate Commerce Commission, extend all of your company's indebtedness to this Corporation to August 1, 1955 on condition that at the same time:
>
> > "(1) obligations of your company held by others, maturing in the meantime, are extended to or beyond that date;
> >
> > "(2) satisfactory modifications of interest and other charges are simultaneously made; and
> >
> > "(3) your company undertakes to continue a debt retirement program through the operation of a satisfactory sinking fund.
>
> Yours very truly,"
>
> (Sen. 71).

This then was the letter Snodgrass desired the RFC to write the B & O. The RFC complied and sent its letter of April 6, 1944, making minor word changes but incorporating all the conditions as follows:

RECONSTRUCTION FINANCE CORPORATION
WASHINGTON

CHARLES B. HENDERSON
Chairman of the Board

April 6, 1944

Russell L. Snodgrass, Esq.,
Vice President
Baltimore & Ohio Railroad Company
Baltimore, Maryland

Dear Mr. Snodgrass:

This will advise, in reply to your letter of March 14, 1944, that, since it was stated in this Corporation's conditional commitment contained in my letter of February 19, 1944, to you, that the proposed additional loan of not to exceed $6,500,000 and the proposed extension of this Corporation's loans of $13,490,000 to your Company which matures on August 1, 1944, as well as all other indebtedness of your Company to this Corporation, should all be secured by the same collateral, as more particularly set forth in my said letter, it is agreeable to this Corporation that the proposed additional loan, the proposed extended loan of $13,490,000 and all indebtedness of your Company to this Corporation maturing on November 8, 1944, shall be treated as one consolidated debt.

This Corporation is willing that such consolidated debt shall mature January 15, 1955 subject to the approval of the Interstate Commerce Commission and upon prior or concurrent compliance with the following conditions:

(1) All debt of your Company (except equipment obligations) which now matures by its terms during the period between November 8, 1944 and January 15, 1955, shall be extended so as to mature not earlier than January 15, 1955;

(2) Your Company shall make such modifications of its interest and other charges on its outstanding securities as shall be satisfactory to this Corporation;

(3) Your Company shall agree to establish and carry out a Debt Retirement Program, which shall be effective at least until January 15, 1955 and also be satisfactory to this Corporation;

(4) The obligation or obligations of your Company evidencing such consolidated debt shall be satisfactory in form and substance to this Corporation.

Nothing contained herein is intended to vary the provisions of the conditional commitment set forth in my letter of February 19, 1944 except the provisions as to the maturity of the consolidated debt above referred to.

Very truly yours,

/s/ CHARLES B. HENDERSON
(PX. 68, p. 1750).

Once the April 6th letter had been procured by Snodgrass in response to his letter of March 14th he had the evidence which he deemed requisite to persuade the court of the unavoidable character of the bankruptcy proceeding and the necessity for the reorganization plan he had devised.

A certain delicacy of feeling was exhibited however toward these two letters by B & O's veteran General Counsel John J. Cornwell, who caused certain references to them to be deleted from the minutes of the Executive Committee meeting of April 10, 1944 (Sen. 418). Governor Cornwell, who was also a B & O director, a month

later wrote "Read with interest. Finis!" on the back of a legal opinion which advised B & O that it could not embark on the Snodgrass bankruptcy program unless the directors "ascertained and honestly believed" the RFC would not extend its loan except on the conditions outlined in the April 6th letter (OX. 20, pp. 3419, 3446). References to this legal opinion were also removed from the minutes of the Executive Committee meetings (T. 3449). These two operations of doctoring the B & O minutes in themselves bespeak bad faith. Snodgrass' views finally prevailed over Cornwell's however and the letters were used in court.

(II) RFC's Collaboration With B & O in Concealing the Snodgrass Drafts.

The missing links discovered by the Senate Committee were found, as has been noted, in the files of the RFC and were not produced in court. That they were deliberately suppressed by both RFC and B & O acting in collaboration is indicated by two facts:

(1) Snodgrass assured the District Court under oath that the correspondence between B & O and RFC put into evidence by B & O "were the only official communications" on the RFC-B & O negotiations (T. 260). This testimony was given in the presence of RFC counsel who took no steps to correct it.

(2) On September 24, 1945, while the case was pending in the District Court, W. W. Sullivan, Chief of RFC's Railroad Division, in whose files the originals of the drafts were found by the Senate Committee, forced his entire staff to pledge themselves to secrecy in the follow-

ing memorandum which they were ordered to read and sign:

"MEMORANDUM FOR RAILROAD DIVISION PERSONNEL:

"As you know, certain charges have been made regarding the adjustment plan of the Baltimore & Ohio, dated September 1944. The position of the RFC was criticized by the opponents of the plan and I have been informed that efforts will be made to obtain some information from the records of the Railroad Division of the RFC in regard to the B & O.

"Please refer to me any inquiry you may receive from any person, whether he be connected with the RFC or from the outside. *We must not, under any circumstances, release anything to anyone,* whether the inquiry is made under the guise of friendship or otherwise.

"The parties who have made the charge against us may be unscrupulous and will take advantage of any opportunity to gain information.

"Please sign your name below to indicate your understanding.

/s/ W. W. SULLIVAN"

(Italics supplied.) (Sen. 192).

No less than 36 RFC employees, ranging from office boys to stenographers and secretaries were forced to sign this remarkable memorandum inspired by some one whose name Sullivan said he could not remember. Sullivan admitted before the Senate Committee, that he had in his files the drafts prepared by Snodgrass, "the drafts" as he said, "on which *we* built the April 6 letter" (Sen. 194).

Snodgrass excused his court testimony to the Senate Committee on the ground that "I had forgotten entirely about drafting the letter until it was brought here the

other day, because I have drafted so many things in my life" (Sen. 477). B & O Counsel Dean had another if somewhat contradictory explanation. The fact "of Mr. Snodgrass' preparation of the drafts upon which the letter of April 6, 1944 * * * was based * * * was not made known to the court because nobody thought it had any significance whatsoever" (Sen. 738). Yet Mr. Dean as Chief Trial Counsel told the District Court in the B & O brief: "The evidence shows conclusively that RFC's imposition of conditions was not * * * done at the behest of Petitioner's (B & O's) officers." The evidence might have been less "conclusive" had the draft letters been produced instead of being suppressed.

Mr. Dean apparently also forgot that on July 11, 1945 Judge Parker had directed the production in court of all memoranda by B & O relating to its RFC negotiations. Except for the 1½ page memorandum by Snodgrass of the May 12th conference previously mentioned, no other documents were produced in response to this order. Snodgrass at that time was particularly asked by Judge Parker: "Are there any other memoranda, Mr. Snodgrass?" To which the Vice President replied, "No, none that I know of at all" (T. 387, 431). The following answers were also given by Snodgrass to Judge Parker's questioning:

> Q. Were there any verbal negotiations prior to the writing of that letter (the April 6th letter)?
>
> A. I had talked with some of the examiners and so on.
>
> Q. Who did you go to?
>
> A. W. W. Sullivan, Frank Wright, assistant to the directors in charge of railroad matters; but those letters* are the only official communications.

* The letters, including the March 14 and April 6, 1944 letters previously put in evidence by B & O at the court hearing, but not including of course the two draft letters communicated under date of March 15 and 17, or the covering letter to Wright dated March 17, 1944.

Q. I understand, but I thought when people handle matters of this importance, they generally handle them personally rather than by correspondence and then you reduce it to correspondence to give evidence on the final conclusion reached.

A. No. That I think is absolutely true in dealing with a bank and so on, but you are dealing with a corporation here that decides matters only at meetings of its board of directors.

By Judge Chestnut:

Q. You mean the RFC?

A. Yes, I was there 10 years (T. 260).

Thus Snodgrass not only concealed the draft letters and the covering correspondence to RFC, but he denied that the April 6th letter was a reduction to writing of an agreement negotiated and concluded prior thereto. By this testimony he took away the defense subsequently made at the Senate hearings by B & O Counsel Dean that "the RFC's position had been taken before the first draft of the letter was made" (Sen. 738). Not only did Snodgrass in his court testimony flatly repudiate this sequence of events, stating there was no board action and no conclusion reached by RFC with B & O prior to April 6, but he also did not even suggest having any verbal negotiations or obtaining the letter's conditions, directly or indirectly, from Jones prior to that date.

Significantly enough not one RFC official who participated in the "negotiations" came forward to testify at the Senate hearings in support of the argument that RFC's position had been taken before the first draft of the April 6th letter was made by Snodgrass. The Chairman of the Committee extended an invitation to Mr. Jones to appear, but the former Federal Loan Administrator did not accept.

The B & O minute book also fails to bear out the story that RFC had determined on a B & O reorganization before Snodgrass suggested it in March—or even April—1944. Surely such a fateful decision by RFC would have been reported to the Directors had it in fact existed before April 6, 1944. The minutes for the period in question are abundant with reports of the RFC maturity problem and the negotiations for and offer of the new loan of $6,500,000 but are bare of any reference to this ominous decision (Sen. 446-7).

The minutes of the B & O executive committee meeting of March 15, 1944 show Mr. Snodgrass advising the board *not* that RFC had decided to force a reorganization but as having decided to lend B & O another 6½ million dollars. *In short the offer of February 19, 1944, which RFC Chairman Henderson said was proof that RFC did not consider B & O in need of reorganization, was still in effect on March 15, 1944,* the very day when Snodgrass gave to Wright his draft of the conditions which made the reorganization inevitable. It seems inconceivable that the financial vice president would not have reported to his directors on March 15 any decision by RFC to force B & O into a bankruptcy proceeding, had such a decision in fact existed prior to his suggestion of the conditions requisite for it. His only information to the directors on March 15, 1944 was that RFC "had agreed, subject to the approval of the Interstate Commerce Commission, to accept a new note for the $13,490,000 principal amount of the August 1, 1944 notes * * * and likewise subject to the approval of the Interstate Commerce Commission, to loan this Company up to $6,500,000 * * *." He did not even inform them that he had sent RFC his letter of March 14, asking the conditions on which the loan

would be extended. In the circumstances Snodgrass' preparation on the evening of March 15, a few hours after the executive committee meeting, of the First Draft of the RFC's letter of April 6, 1944 is especially striking.

The evidence is clear that by the morning or afternoon of March 15, 1944, RFC had *not* informed B & O that RFC regarded B & O as anything but a solvent company which had no need for another reorganization; and that on the same evening B & O's financial vice president was drafting a letter for RFC to adopt which would serve as the excuse for another B & O bankruptcy. As Mr. Traphagen had written in the spring of 1942, the B & O's maturities in 1944 "which we could probably deal with without great difficulty" offered an opportunity for a general reorganization. B & O's financial vice president in his dealings with the RFC made the most of that opportunity.

That the circumstances of the writing of the fatal letter, its origin and authorship were deliberately misrepresented to the court is clear beyond question. Snodgrass supported the language of his memorandum on the May 12th conference by his oath (T. 431-3), thereby misleading the court to believe the conditions were "specified by the RFC". When asked on cross-examination when he first learned that an alleged plan of his for meeting the RFC maturities without a bankruptcy proceeding would not work, he answered "I learned that to be the actual fact when I got that first letter from the RFC" (T. 475). The conditions in the letter, he likewise testified, "were very disappointing to me at the time" (T. 243). Having thus expressed his surprise and disappointment at the contents of a letter which he wrote himself, he failed to bring into court his own office copies of the draft letters

although directed by Judge Parker to bring in all the relevant memoranda. He denied under oath the existence of any other documents by explicit testimony at two different times.

The crucial findings which the lower court made were that the conditions of the April 6th letter had been "independently" imposed by RFC and were not "inspired or stimulated" by B & O and were "without collusion". The Court also referred to the "general credibility" of these "reputable witnesses" who "emphatically refute the suggestion that the past or present attitude of the RFC was inspired or stimulated by the officers of B & O." In short, all these findings were produced by testimony compounded not of one but of numerous falsehoods made credible only by legal tactics of a most questionable sort. This included suppression of evidence in which the RFC willingly and readily collaborated with its former officials in the B & O management even to the extent of exacting signed pledges of secrecy from its office boys!

D. Seven Instances of Window-dressing and Falsification of the Financial Facts Relating to B & O's Ability to Meet Its RFC Debts.

Integral to the issue of "good faith in a bankruptcy proceeding" is the further question of the ability of the debtor to meet the debts upon whose actual or imminent default depends the jurisdiction of a bankruptcy court. The District Court found the B & O was "unable to meet its debts matured or about to mature" (the statutory language) and identified these debts as some 80 million dollars of loans from the RFC due in 1944. From November 8, 1944 to July 1, 1948 B & O faced no major maturities of bank loans or bonded debt. In other words, with the

RFC debts met B & O had available almost a four-year interval before being required to meet any other major financial problem, and there is no evidence in the record that B & O's post-1944 maturities were any more insuperable a problem than those of other RFC borrowers such as the Southern Pacific, the New York Central, Illinois Central, Southern Railway and others of the 41 railroads that paid off their RFC debts in full and refinanced their early maturities (Sen. 167-8). It is also conceded that an alleged inability to meet the 1948 or later debts could not have conferred jurisdiction in 1944 or 1945 upon the bankruptcy court in view of the statute's express limitation to "debts matured or about to mature" (Sen. 311).[6] The jurisdiction of the District Court therefore depended largely on the truth or falsity of the allegation of inability to meet the RFC debts.

Two B & O petitions were filed in the Interstate Commerce Commission,[7] the first on December 4, 1944 and the second on January 3, 1945.

The first of the ICC petitions did not require the ICC to find B & O unable to meet its RFC debts or to pass upon the good faith of the proposed bankruptcy proceedings. The second ICC petition required it to consider the question of B & O's resources, but no specific finding of inability was required nor made, and no hearing was held or investigation conducted. The order approving the extension of the RFC debts was granted solely on the basis of an ex parte application by Vice President Snodgrass in which he verified by oath that "no part of the monies" necessary

6. Opinion dated May 9, 1944 of Sullivan & Cromwell, B & O counsel (Sen. 309).

7. The first was an application for the ICC to approve the issuance of the new B & O securities, provided by the plan, as required by Chapter XV; the second for approval of the extension of the RFC loans, a requirement under Section 5 of the RFC Act (261 ICC 51, 211).

to refund the notes of B & O held by RFC "can be secured from any other source" (Sen. 189).

The Chief of RFC's Railroad Division, W. W. Sullivan, and B & O Director Cheston both admitted to the Senate Committee that part of these monies could have been paid by B & O (Sen. 190, 197, 531) although they limited the amount to "several millions" or "up to 10 millions". These belated admissions from hostile witnesses are significant, but they grossly understate the facts as will be shown. In May 1942, as previously mentioned, Director Traphagen of B & O stated "we could probably deal with the maturing notes in 1944 and the obligations to the RFC without great difficulty" (Sen. 442). Director Traphagen was then and still is President of the Bank of New York. His judgment therefore was that of an expert in the field and was made after B & O had already earned total net profits for 1940 and 1941 of 26 million dollars. In the four years following B & O earned net profits, *after all taxes*, of more than 110 million dollars (Sen. 166; PX. 87, p. 2010). The accuracy of the 1942 Traphagen statement was thus easily substantiated by the subsequent earnings. But, as Director Traphagen emphasized in his confidential letter of May 1942, earnings or no earnings, 1944 was the year to start a B & O reorganization. The subsequent enormous net profits—which broke a 120-year record of B & O—embarrassed this program.

(I) Diversion of $31,500,000 in Cash, and

(II) Cancellation of $12,000,000 of Bonds

To avoid maintaining B & O in a position of affluence which would make obvious to the most unsophisticated bondholder its ability to meet the RFC debts, the B & O management effected the following program:

(1) 31½ million dollars of B & O funds were diverted from payment of the maturing RFC debts to the purchase on public tenders in 1943 and 1944 of various miscellaneous bonds maturing in 4 to 55 years after the maturity of the RFC debts in 1944 (PX. 92, 93, pp. 2240-1).

(2) 12 million dollars principal amount of B & O first mortgage and divisional first mortgage bonds were cancelled on August 16, 1944, the very eve of the "bankruptcy," thereby making unavailable for reduction of the RFC debts the proceeds that might have been realized from sale of these bonds (Sen. 687-90).

By these two actions up to 43½ million dollars in assets —equal to more than 50 percent of the RFC debt—were removed from availability for reduction of that debt.

(III) Overmaintenance of the Properties

A third noteworthy fact is the huge maintenance expenditure made by B & O in 1943 and 1944, an expenditure so great as to give B & O a ratio of maintenance expenses to operating revenues higher in these years then for any of the other 22 major railroad systems earning gross revenues of 100 million or more dollars annually (OX. 32, p. 3486). This abnormal over-expenditure also resulted in the diversion of funds from payment of the RFC debts.[8]

Despite these drastic measures, the large net income that B & O was earning, and might continue to earn, remained to constitute a threat to the realism of the scenery the management was arranging to convince the ICC and the court of B & O's poverty in the midst of plenty.

8. The court quotes B & O Chief Engineer Clark as testifying to an explanation he never made, and it also relied on an explanation (see footnote 14 at page 556 of 63 Fed. Supp.) that was not put in evidence for its "answer" to the charge of over-maintenance.

(iv) The $50,000,000 "Under-estimate"

A request dated January 24, 1945 was made of B & O by the Director of the ICC's Bureau of Finance for "a forecast of B & O receipts and disbursements for each month of 1945, and the resulting cash on hand as of the end of each month" (T. 1990). Snodgrass fulfilled this request by forwarding under date of February 3, 1945 a schedule which subsequently proved to be 50 percent inaccurate within only 24 days of its submission. This "inaccuracy" was an under-estimate by some 23 million dollars of the total cash and government bonds to be available to B & O as of February 28, 1945. By the end of March 1945 the under-estimate amounted to a figure more than 31 million dollars, or 95 percent higher than the Snodgrass estimate. For September 30, 1945 the estimate of total cash and government bonds to be available was 35 million dollars; the actual figure proved to be 83 million dollars, the difference of 48 million dollars representing an under-estimate of more than 130 percent (Sen. 261). The rapidity with which the B & O estimates turned "inaccurate" and the extreme degree of error, which obviously loaded the scales in favor of the bankruptcy petition, cast more than a suspicion as to the integrity of this tabulation.

Relying on the B & O estimates the ICC approved the extension of the RFC loan proposed under the B & O plan (261 ICC 211). By the time the actual figures were reported to the ICC for the months covered by the estimate, the case was out of its hands.

(v) Alteration of the Working Capital Minute

The District Court did not have before it the balance sheets of B & O for the months after July 1945 when it

handed down its decision on November 20, 1945. As a consequence, it decided the case on the basis of the financial figures in the July 31, 1945 balance sheet. The discrepancies between the Snodgrass estimates and the actual figures reported to the ICC for the months August through December 31, 1945 could not therefore have been commented upon in its decision, while the discrepancies for the earlier months, February through July 31, 1945, had not at that time been detected. On the evidence before it, the District Court stated:

> "Without here analyzing in detail the several items of current assets and current liabilities, we are satisfied from the testimony of the B & O's financial vice president and from other evidence in the record, *that no substantial cash sum could fairly be presently withdrawn* from current assets to apply on the 1944 maturities. The question is not whether the available current assets could be used to pay debts in liquidation, but whether the working capital as a whole, necessarily excluding the large item of materials and supplies is more than reasonably *adequate* for the B & O system as a going concern, doing presently a volume of $380,000,000 of business annually, operating in 13 states, and having 128 bank accounts. The testimony of Mr. Snodgrass, the B & O's financial vice president, analyzing the April 1945 balance sheet was to the effect that the available cash for current payments was only about $16,00,000, while he thought $20,000,000 was reasonably required. The later balance sheet of July 1945 is not very greatly different in its figures. *We do not find that the working capital is unreasonably large* * * *" (Italics supplied.) 63 Fed. Supp. at page 556.

It should be noted that the working capital shown by the July 1945 balance sheet was 51 million dollars (PX. 86, p. 2007).

That the testimony Vice President Snodgrass gave on this question was calculatedly false is indicated by the following new evidence discovered by the Senate Committee:

(1) On April 21, 1943 the B & O directors enacted a resolution of the board reading in part:

> "* * * In the judgment of the Board of Directors of this Company the amount of working capital which would be *adequate* and requisite for the purposes of the Company should not be less than *$6,225,000.*" (Italics supplied.) (Sen. 402)

(2) A copy of this resolution carries the notation "Okay," signed "R.L.S." (Sen. 402), the initials of Vice President Snodgrass.

(3) The language quoted above from the resolution was in the minute book of the Board of Directors until at least December 8, 1943, when B & O Secretary May prepared a certified copy of it (Sen. 416). Shortly thereafter Vice President Snodgrass proposed B & O be put through a bankruptcy proceeding, and the quoted language was eliminated from the minute book by unidentified persons. This is the third instance of the minute book's being altered prior to the filing of the bankruptcy petition.[9]

At the Senate investigation Snodgrass could not explain the disappearance of the quoted language from the minute book:

> "The Chairman. Why is not the language there? Mr. Snodgrass. I do not know. If you want me to speculate, I would be glad to do that." (Sen. 406)

The "speculation" of Snodgrass and his assistant Baukhages was that the certified minute was "not a true copy

9. See pages 38-39, this brief.

of the final action" of the meeting and was "simply a mistake." Corroboration of the authenticity of the minute however is found in a memorandum dated October 15, 1943 to Snodgrass from General Solicitor Clay (Sen. 403), in which the language in question is quoted as being a part of the April 21st minute. Secretary May's certified copy as of December 8, 1943, General Solicitor Clay's memorandum, and Snodgrass' own initialling "okay" establish beyond a reasonable doubt the authenticity of the minute as quoted.

It is quite obvious, however, why the quoted language was deleted. When the B & O Vice President testified in court the unprecedented prosperity of the Company had pushed its net working capital to an all time high of $51,200,000, or $45,000,000 more than the figure established by the directors as "adequate and requisite". A bankruptcy court or opposing party examining the 1943 minute before its alteration would naturally conclude that it substantiated the availability of this excess amount of $45,000,000 for payment of the RFC debt. By December 31, 1945, the last date for which a B & O balance sheet was produced in court prior to the signing of the final decree on March 13, 1946, the net working capital had leaped to the unprecedented figure of $68,100,000, or about $62,000,000 more than the "adequate and requisite" minimum.

Although petitioner herein whom the court recognized as "a railroad economist of long experience", had testified, without knowledge of the above minute, that at least 40 million dollars of the July 1945 working capital could be applied to the RFC debts, the lower court accepted the Snodgrass testimony instead. The suppressed minute corroborated, of course, the rejected testimony and im-

peached the accepted testimony. Furthermore, the soundness of the directors' judgment as expressed in the suppressed minute is abundantly supported by B & O's history, as shown in the following exhibit used by the Senate Committee:

Table illustrating increase in company's ratio of net working capital to total of fixed charges and dividends paid, 1929 through 1946

Year as of Dec. 31	Net working capital (1)	Fixed charges[1] (2)	Dividends paid[2] (3)	Total of (2) and (3) (4)	Ratio of net working capital to total payment
					Percent
*1925	$26,300,000	$30,100,000	$12,400,000	$42,500,000	62
*1926	30,000,000	32,100,000	14,200,000	46,300,000	65
*1927	23,300,000	29,000,000	16,100,000	45,100,000	52
*1928	23,400,000	30,000,000	18,500,000	48,500,000	48
*1929	36,500,000	31,000,000	21,200,000	52,200,000	70
*1930	—2,400,000	32,200,000	12,600,000	44,800,000	....
*1931	—25,700,000	33,100,000	.....	33,100,000	....
*1932	12,000,000	33,400,000	.....	33,400,000	39
*1933	4,700,000	32,300,000	.....	32,300,000	15
*1934	4,600,000	32,600,000	.....	32,600,000	14
*1935	3,400,000	32,900,000	.....	32,900,000	10
*1936	3,000,000	32,200,000	.....	32,200,000	9
*1937	—100,000	32,200,000	.....	32,200,000	....
*1938	—4,800,000	31,800,000	.....	31,800,000	....
*1939	6,300,000	31,600,000	.....	31,600,000	20
*1940	11,000,000	31,500,000	.....	31,500,000	35
*1941	5,100,000	31,200,000	.....	31,200,000	16
*1942	19,100,000	28,300,000	.....	28,300,000	67
*1943	38,900,000	27,400,000	.....	27,400,000	142
*1944	41,200,000	26,500,000	.....	26,500,000	155
*1945, July 31	51,200,000	26,700,000	.....	26,700,000	192
*1945, Dec. 31	68,100,000	26,700,000	.....	26,700,000	251
1946	56,900,000	[3]26,700,000	.....	26,700,000	213

* The figures for these years were in evidence in the District Court.
[1] Actual fixed charges, including contingent interest, paid or accrued in the 12 months following the year end in question.
[2] Actual dividends paid in the 12 months following the year end in question.
[3] Estimated.

This table is incontrovertible evidence of the padded condition of B & O's net working capital account.

What finally destroys the Snodgrass testimony that "no substantial cash sum could fairly be presently withdrawn from current assets" are the actual financial facts as they developed in the 1½ years to December 31, 1946, the latest date in the record since the testimony was given. Although steel, automobile and coal strikes intervened, B & O's net working capital at the end of 1946 was still more than 21 million dollars higher than shown in the April 1945 balance sheet (PX. 48, p. 1736) on which Snodgrass testified. Instead of being needed in the operation of the system these huge accumulations of net working capital have thus been maintained without being put to productive use—as they still could be—in retirement of debt.

The availability of at least 50 million dollars of net working capital for payment of the RFC debt is thus supported by the evidence of the doctored minute, the historical table above, the actual facts as they developed since the Snodgrass testimony was given, and the expert testimony of Robert R. Young, whose financial qualifications are indisputable (Sen. 273). The persons altering the 1943 minute clearly understood its importance.

(vi) Misstatements of Collateral Available for Sale

Another device used by B & O to persuade the District Court of its inability to meet the RFC debts was to insist on the impossibility of using any of the collateral to that debt without inflicting grave injury on the system. The opinion of the Court on this point follows:

> "Other important items in the list of collateral are very substantial holdings by the B & O of stocks in the Reading Company and *the Western Maryland Railway, and the Southwestern Construction*

Company. It is of the utmost importance to the integrity of the B & O system that these stocks be held by the B & O. Their holding is highly important as the basis for important railroad operating arrangements between the B and O and the Western Maryland and Reading Railroads, and the Southern Railway * * *. It would be *utterly disastrous* to the unity of the B and O System and would entail a very great impairment of its earning capacity if, in consequence of the sale of these stocks, the operating arrangements now in force should be terminated * * *. It is the very purpose of this present proceeding to avoid this *disaster* which would certainly cause great loss to the holders of securities affected by the present plan." 63 Fed. Supp. at page 560.

Needless to say, testimony to support the above findings was supplied to the Court by two B & O officials, President White and Vice President Snodgrass. The Senate Committee subsequently discovered that sale of the Southwestern Construction Company stock, rather than being pregnant with considerations of "disaster" and "threats" to the system's "integrity", had actually been considered feasible by the B & O directors. Under date of May 6, 1942 the late Vice President Shriver of B & O informed Jesse H. Jones, that "the executive committee of this company (B & O) has authorized Mr. White, our president, to enter into negotiations with the Southern Railway Company for the sale of this stock" (Sen. 746).

The sale subsequently fell through for reasons unrelated to the availability of the stock. "The whole matter resolves itself into one of price; and what the stock is really worth" (Sen. 748). Thus once more the duplicity of the B & O officials is obvious in leading the Court to think a sale was implicit with "disaster" to the "integrity" of the system.

As for the Western Maryland stock referred to in similar vein in the Court's opinion, the B & O records show that Daniel Willard, when B & O president, himself stated "it is in no sense necessary from the Baltimore & Ohio standpoint that that Company should have the Western Maryland" (pp. 3618-9, Vol. 5, *Senate Report on Railroad Consolidation,* No. 1182, 76th Congress, 3rd Session). Furthermore, the ICC has held that B & O's ownership of the Western Maryland stock is in violation of the anti-trust laws and of the Interstate Commerce Act (160 ICC 785). To this decree B & O has submitted, without appeal to the courts, and the stock has been trusteed at the Commission's direction (183 ICC 165). Certainly these facts are inconsistent with the "disaster" and "threats" of "integrity" testimony given by the B & O officials, and swallowed whole by the lower Court.

The Southwestern Construction Company and Western Maryland stocks had a total market or appraised value of $10,000,000 and $23,000,000 respectively, as of December 26, 1944, all of which of course was available to reduce the RFC debt.

(VII) The $16,000,000 Tax "Error"

A final device used by B & O to distort its ability to meet the RFC debts was to deny through testimony by Vice President Ekin that it was "the expected recipient of further refunds under the Excess Profits Tax Law" (T. 1887). The Senate investigation revealed that within less than nine months of this testimony B & O took into its 1946 income account $16,000,000 in the form of tax credits or refunds under that tax law (Sen. 630: 2T. 25).[10]

10. The court refused to believe testimony in 1945 by petitioner that B & O's income for 1946 was protected by potential tax refunds.

It is impressive that by the time of the Senate investigation every major financial fact on which the court based its finding that B & O was unable to meet its RFC debts had been proven false by the passage of time alone or by the new evidence discovered by the Senate Committee.

The effect of each one of the above seven actions was to minimize the resources available to the B & O for repayment of its debts to the RFC. The existence of all these conditions simultaneously in one bankruptcy proceeding is so unique and unnatural as to make it impossible to draw therefrom any conclusion other than the existence of a premeditated, fraudulent intent. When to these facts are added the misrepresentations about the origin of the bankruptcy plan (pp. 19-24, *supra*), and the fraudulent concealment of the drafts, origins and authorship of the April 6th letter (pp. 25-45, *supra*), there is established a series of circumstances which can not be dismissed as accidental. This series does not signify a freak combination in a world of human affairs, but can only mean the existence of an underlying plan of fraudulent design.

E. Seven Additional Positive Acts of Bad Faith.

Included in the new evidence discovered by the Senate Committee was a behind-the-scenes record of the extreme measures B & O took to overcome the opposition to its bankruptcy plan organized by petitioner.

(1) Withholding Opposition Literature from the Mails

As the owner with members of his family of $100,000 principal amount of the Convertible bonds, Mr. Phillips, a New York financial consultant, endeavored to send out a letter dated April 19, 1945 (OX. 5, p. 3402), advising

the Convertible bondholders of his doubts concerning the good faith and equity of the B & O plan. After the contents of the letter had been cleared with the SEC, the B & O was required to mail this letter, under the Commission's proxy rules, to all the holders of record of the Convertible bonds. Instead of doing so, it suppressed the mailing of the letter. Vice President Snodgrass alleged to the SEC that the letter violated its rule prohibiting solicitations of proxies by statements which are false and misleading. The SEC threw out the charges (T. 511). Thereafter, on May 5, 1945, Vice President Snodgrass presented one of the letters for mailing to the Postmaster at Baltimore, and by obvious prearrangement had the letter barred from the mails on the same day on the ground that the imprint of the word "warning" on the envelope violated Section 212 of the Criminal Code relating to the mailing of obscene or libelous matter (PX. 72, p. 1754). The Baltimore postmaster, although not a lawyer, upheld the B & O contention in a letter also dated May 5, 1945 (PX. 73, p. 1756) but the Solicitor in Washington thereafter reversed the "ruling", and held the envelope mailable. Vice President Snodgrass then prevailed upon an Assistant Solicitor, in the absence of the Solicitor, to suspend his superior's ruling pending a hearing to be held a week later (T. 512; PX. 74, p. 1757). After this "hearing", the Assistant Solicitor withdrew his own ruling and also held the envelope mailable (PX. 75, p. 1758). Having exhausted its devices for delay, B & O finally mailed the letter on May 15, 1945. During this month while it was suppressing the opposition's letters, B & O obtained 2,000 individual assents for some $12,000,000 principal amount of Convertible bonds, equal to one-third of the total assets requisite under the statute (T. 118).

(II) Obtention of Confidential Information About the Contents of Petitioner's Private Box in a United States Post Office

The Senate Committee discovered that Vice President Snodgrass had by devious methods found out "from confidential sources, which I believe to be reliable, • • • that since May 24 to and including June 16 (1945), he (Mr. Phillips) had received 320 letters and 276 of his so-called proxy cards. Of these, he has received 267 of the letters and 241 of the cards since mailing of his May 28 circular." This is quoted from a memorandum (Sen. 420) by Snodgrass, dated June 19, 1945, to a special committee of the Executive Committee, consisting of Chairman Stewart McDonald, Director J. Hamilton Cheston and Counsel Arthur Dean. The unusual circumstance in which the contents of an individual's private box in a United States Post Office were divulged by "confidential sources" prompted the Senate Committee's curiosity. Vice President Snodgrass' memory failed him when he was asked the name of the "confidential sources" (Sen. 422), but he subsequently informed the Committee that he had the information from W. R. Bixler, B & O's assistant treasurer in charge of its New York office and that Bixler had allegedly obtained it as follows:

> "He employed an agency. Representatives of that agency looked from time to time through the glass front of Box 105, Station Y, New York, and noticed the number of letters therein. When Mr. Phillips called for his 'business reply envelope' cards, the agency representative would place himself in a position to overhear the postal clerk's announcement of the amount of money due. He then determined the number of cards received by dividing that amount by four cents.'" (Sen. 755.)

(III) OBTENTION OF CONFIDENTIAL INFORMATION BY MYSTERIOUS MEANS OF TRANSCRIPT OF PETITIONER'S BROKERAGE ACCOUNT OVER SIX-YEAR PERIOD

Vice President Snodgrass got confidential information from other sources than U. S. Government Postoffice boxes. In an even more miraculous manner he obtained confidential information from the private ledgers of a Wall Street brokerage house concerning security transactions by Mr. Phillips and the members of his family. The Senate Committee discovered in the Snodgrass files an unsigned and undated memorandum in question and answer form relating to all transactions from the years 1939 to 1945 by Mr. Phillips and his family in B & O bonds (Sen. 425). Snodgrass admitted he composed the questions set forth in the memorandum, but how the answers came to be placed under the questions he did not know. Several weeks later he told the Senate Committee that the memorandum had arrived through the mails in an anonymous letter (Sen. 425, 669). The following exchange took place on this testimony:

> "The Chairman. The age of miracles never was, and now is. Here are two of them here. * * * Providence has been kind to you, sir."
> "Mr. Snodgrass. Yes, sir" (Sen. 674).

(IV) ATTEMPT TO INTIMIDATE PETITIONER FROM APPEARING IN COURT

The B & O did not even scruple to violate the criminal code of the United States with respect to the intimidation of witnesses or parties to a proceeding in a Federal Court. An "investigator" was sent to see Mr. Phillips two days before the beginning of the trial of the case in September 1945. The name of Mr. Phillips'

father was Darius V. Moses, who died when petitioner was 2½ years old. Thereafter his mother had resumed her maiden name of Phillips and brought her children up under it. The B & O's investigator, approaching Mr. Phillips on behalf of "persons interested in the B & O Railroad," said they believed the change in name was so embarrassing to Mr. Phillips that they threatened to disclose it if he appeared in court the subsequent Monday in opposition to the plan. Mr. Phillips reported the incident to the United States District Attorney's office at New York, and was advised to inform the Court. Mr. Phillips thereupon informed Judge Chestnut in chambers of these facts "but the Court was not interested and refused to make any investigation" (Sen. 432).

When Vice President Snodgrass took the witness stand in court, Mr. Phillips asked him if he had caused an investigation to be made of him (Sen. 432). "He said 'no'. Then he changed his mind very quickly and said 'Oh, oh, yes'" (Sen. 432). At the Senate hearing Snodgrass denied that he had told the "investigator" to make the threat in question, and also denied any knowledge of the incident. These denials should be considered in the light of other denials in testimony by Snodgrass in these proceedings. It should, moreover, be noted that at the Senate investigation B & O's General Solicitor Baukhages circulated to some of the Senators the information on the change of name because he thought it was "an interesting fact" (Sen. 440).

(v) The S.E.C. Charge of "Material Misrepresentation" by B & O

In its decision the District Court made the following findings on the issue of whether B & O's assents to its

plan had been procured by material misrepresentations of fact in its soliciting literature:

> "We find no material misrepresentations of fact in the letters of the president of the Railroad inviting assents to the plan. The criticism of the wording objected to seems to be based only on the objector's personal interpretation of the language and is more argumentative than factual * * *."
> 63 Fed. Supp. at page 555.

The Senate Committee discovered however a letter from the Corporation Finance Division of the SEC to Vice President Snodgrass, dated July 7, 1945, reading in part:

> "This is to advise you that unless steps are taken by the company to mail to all persons receiving the June 25 letter (of B & O) * * * a new letter correcting the statements contained in such letter * * * which in the opinion of this division are materially misleading, and to afford to all owners of convertible (bonds) who assented to the Adjustment (Plan) of the issuer on or after June 28, 1945, an opportunity to revoke or affirm in writing the assents so given, this division will recommend to the commission that appropriate steps be taken to enjoin the issuer from using such assents until corrections are made and an opportunity given for revocation or affirmation in writing of such assents * * *." (Sen. 449-51.)

No letter of correction was sent by B & O until August 4, 1945, or after this Court had issued its order of July 11, 1945. The so-called letter of correction did not indicate its motivation but instead made it appear that it was written in response to a letter by intervenor. The assents obtained prior to July 11, 1945 were used by B & O to secure the jurisdiction of this Court and the order of

July 11, 1945, and the assents procured prior to August 4, 1945 were used by B & O to procure the order and decree of March 13, 1946 (2T. 21-22).

Additional evidence of misrepresentative practices by B & O was found in the Senate Committee's own files. These showed that a statement had been filed by RFC with it in June 1946 showing the principal amount of RFC loans to B & O as "delinquent" since 1944. As a result of this delinquency all bond interest made contingent under B & O's 1939 Plan became fixed interest, a fact which the bondholders were not told in B & O's 1945 soliciting literature, which made a contrary representation. Both this Court and the Interstate Commerce Commission were informed by B & O that these loans were not regarded by RFC as in default (2T. 22).

(vi) Two B & O Officials "Forget" Under Oath Their General Solicitor's Name

To the above aditional evidence of bad faith should be added three specific acts of the B & O officials during the conduct of the preliminary hearings in the District Court in July 1945. Prior to those hearings, General Solicitor Clay had repeatedly warned President White, General Counsel Cornwell, and Vice President Snodgrass that the contemplated bankruptcy proceeding would be "a shady reorganization", and "a fraud upon the Courts" (OX. 20, pp. 3419, 3429-71). As a result of his attitude Clay was relieved of any responsibility for the conduct of the case. Earlier Henry W. Anderson, Chief Counsel for B & O at the 1939 proceedings, had warned B & O officials that he thought the proposed bankruptcy proceedings could "be knocked into a cocked hat" (OX. 20, p. 3432). He

resigned rather than be associated with B & O during the course of the second "bankruptcy" proceeding.

None of these facts were known outside of the B & O management. During the July 1945 hearings both President White and Vice President Snodgrass were asked by Judge Parker if, and by whom, the issue of good faith had been raised at the May 12, 1944 conference.

Snodgrass answered:

> "There was one person—and I have forgotten who said it—that your failure to extend this loan would result in someone questioning the good faith of your Corporation * * *" (Testimony, July hearings) (T. 246).

White answered:

> "I think it came about by a statement on the part of someone on our side that that question was one that had to be considered. I don't think I remember just who raised the question" (Testimony of White, July hearings) (T. 366-7).

As both witnesses well knew, the issue had been raised by Clay.

(vii) Suppression of the Clay Memoranda

In addition to these acts of the witnesses there should be noted the deliberate failure to produce in court the Clay memoranda relating to the RFC-B & O negotiations. These were suppressed, and not produced even though Judge Parker directed production of "all memoranda of conversations with the RFC" (T. 388-90). The Clay memoranda contained a detailed recital of the RFC-B & O negotiations and conversations, including Clay's pointed observation that the situation "has all the possibilities

of a national scandal" (OX. 20, p. 3463). They were in the files of B & O General Counsel Cornwell, and were only produced in September 1945 after Clay's public resignation and his subpoena by petitioner. Snodgrass had in July, 1945 been asked by Judge Parker whether aside from one memorandum written by him, a page and one-half long, there were any other memoranda on the subject. "No, none, that I know of at all," he replied (T. 431), thereby concealing the Clay memoranda and the draft letters written by him (*supra,* p. 34) as well as other documents subsequently discovered by the Senate Committee.

Had the B & O officials not concealed the facts from the Court in July 1945, it is probable the management would never have received the percentage of assents from bondholders necessary to effectuate the plan. These facts would naturally have been circulated by the opposition to the plan. Certainly once the bondholders were told that B & O's own General Solicitor considered the plan "shady" and "fraudulent", it is dubious that the additional assents needed could have been procured or the prior assents already obtained held unrevoked. By the time Clay resigned in September 1945 and the facts had become public knowledge due to his subpoena by petitioner the necessary assents had been procured by B & O and received in evidence by the Court. No adequate opportunity existed thereafter to acquaint the bondholders with the facts before the hearings closed five days later.

F. RFC's Misrepresentations to the Supreme Court in May, 1946, its Exposure of Government Funds to Unnecessary Risk, and its Present Impaired Status as Creditor.

Under date of May 28, 1946, the RFC filed in this Court a memorandum in opposition to the petition for writ of certiorari filed by petitioners herein on May 11, 1946 (No. 1220, October Term, 1945). That petition was based on the District Court record made prior to the Senate investigation, and consequently was without the benefit of the evidence subsequently brought to light. The representations in the RFC memorandum should be scrutinized anew in the light of this evidence discovered by the Senate Committee.

RFC did not intervene as a party in the proceedings before the District Court nor did it submit any brief or memorandum to it in answer to the charge of collusion and fraud. In its memorandum to the Supreme Court of May 28, 1946, it stated:

> "The sole reason for RFC's submission of this memorandum is that the Phillip's petition contains certain statements imputing motives to RFC which are contrary to fact. The RFC deems it its duty, as an agency of the Government, to inform this Court that certain statements, implications, and innuendoes with respect to RFC in that petition are baseless and without foundation in fact. * * * The RFC believes it appropriate to file this memorandum so that this Court may be informed as to the reasons which guided the RFC * * *" (pp. 6-7).

The RFC however did not deem it "appropriate" to acquaint this Court with the truth about its letter of April 6, 1944, although it spent two pages of its memorandum justifying the conditions set forth in this letter.

It did not reveal that the conditions were originated and suggested to it by Vice-President Snodgrass, and that the April 6 letter had been drafted by this B & O official, and that the drafts were concealed in RFC's files under a ban of secrecy imposed on all its staff under date of September 24, 1945 (pp. 39-40, this brief). The RFC thereby collaborated with B & O in foisting a fraud upon this Court as well as the District Court. Its concept of its "duty as an agency of the government charged with administering public funds" did not include the basic obligation of full disclosure to this Court. So limited and misconceived was RFC's sense of duty that it allowed the District Court to find that RFC's position, "the dominant fact in the case", as the District Court correctly characterized it, was not "inspired or stimulated" by B & O in any way, a finding which the RFC knew would be placed in jeopardy were the Snodgrass drafts in its files to be revealed. One of the basic reasons for this Court to review this case is to give the RFC a greater sense of its "duty as an agency of the government" to serve the highest standards of professional and business conduct. It is noteworthy that at no time has Chairman Goodloe or the present RFC directors entered the mildest protest against any of the acts of the B & O officials, set forth in the Senate records, even though RFC is still B & O's largest creditor and many of those acts are characterized by the lowest kind of professional and business conduct. Since RFC has an official nominee on the board of B & O in the person of Stewart McDonald, Chairman of B & O's Executive Committee and its top ranking official, this omission is especially striking.

Mr. McDonald told the Senate Committee he was put on B & O's Board of Directors by Jesse H. Jones. "Mr.

Jones," he testified, "had a policy of putting what he called 'his man' in all corporations where there were big loans * * * men he had confidence in and who would report to him any violation of usual business ethics" (Sen. 91). As the ranking official of B & O, Chairman McDonald was certainly not uninformed about the numerous acts hitherto set forth, but he did not appear to appreciate the unconscious irony of his remark.

While working on the plan Snodgrass bought 2,000 shares of the stock and in December, 1944, scarcely more than a month after B & O announced publicly its inability to pay the RFC loans, McDonald bought 3,000 shares of B & O Common Stock at about $8.00 a share for his personal account. So great was the speculative fever in this stock following the announcement of B & O's second "bankruptcy" in six years, the price running up from a low of 7¾ to a high of 28⅞, that total sales of the Common Stock on the New York Stock Exchange for the eight months December 1, 1944 through July 31, 1945 exceeded the total sales for the four years 1940 to 1943, inclusive. While total sales of all other stocks on the New York Stock Exchange increased in the first seven months of 1945 only 38 per cent over the like period of 1933, the sales of B & O stock increased roughly 130 per cent, amounting to 2,044,800 shares and exceeding the 1929 average monthly selling volume (Sen. 254).

In contrast to the huge killings and quick profits made by the speculators is the present condition of the RFC loan. In its memorandum to this Court of May 28, 1946 the RFC assured the Court that it was acting in the B & O case as "a careful lender and also in the public interest" (p. 10). The RFC's loans to B & O, it said, "are now so

well secured that private capital should be interested in acquiring the same • • • if the plan is consummated and they are refunded by the proposed Collateral Trust Bonds" (p. 11). "RFC has endeavored to have its loans to the B & O put in such condition that it may dispose of the same to the investing public without loss to the RFC" (p. 8). Furthermore, it assured this Court the new obligations taken by RFC would be issued "in such denominations as to make them readily salable to private investors" (p. 5). Yet within less than a year after giving these unqualified assurances to this Court RFC officials and B & O witnesses were forced to admit before the Senate Committee that the bonds were not readily salable, that its loan was "frozen" and "water logged", that there was "a very severe deterioration" in its collateral and other similar gloomy remarks (Sen. 56, 57, 591, 593). Even Vice President Snodgrass admitted that the RFC directors could not sell their bonds "for enough to get their $80,000,000" (Sen. 481).

The dangerous position in which RFC today finds itself with regard to its largest railroad loan contrasts with the treatment of other RFC loans to railroads. All of RFC's railroad loans outstanding on January 1, 1939 have since been reduced an overall average of 80 per cent, compared with a reduction of the B & O's debts to RFC of only 7 per cent, the lowest reduction for any railroad owing $10,000,000 or more to RFC (Sen. 169-171).

The Senate Committee also received evidence that the B & O management included the greatest number of former RFC and Federal Loan Administration officials of any railroad borrower of RFC; that B & O had the longest outstanding RFC railroad loan and the highest net profits in its 100-year history and yet had the lowest

repayment record of any RFC railroad borrower (Sen. 166-171).

The Senate Committee also received an opinion from its counsel (Sen. 126, 575, 580) that the RFC's agreement to "purchase" the new B & O Collateral Trust Bonds contemplated in the Adjustment Plan was in effect an illegal agreement and in violation of the RFC Act. It also received evidence that the position of the RFC as a creditor would deteriorate and had deteriorated as a result of its agreement. From July, 1946, after the District Court signed the final decrees, to May 1, 1947, the collateral held by RFC had decreased in market or appraised value from a total of 211 million dollars, or 260 per cent of the face amount of its loans, to 152 million dollars or 189 per cent, a drop of $59,000,000 in less than one year's time, according to RFC Chairman Goodloe (Sen. 588). James N. Nicely, Vice-President of the Guaranty Trust Company of New York, however, informed the Senate Committee that "a sceptical buyer may not agree" with the RFC Chairman as to even the 189 per cent coverage, and added that he assumed RFC would lose no opportunity "to place this issue, *if it is placeable*" (Sen. 594). Certainly the ominous doubt of banker Nicely cannot be considered unreal in view of the fact that the major collateral consists of $103,000,000 principal amount of B & O refunding bonds with a demonstrated vulnerability to market changes, and now selling at less than 60 cents on the dollar. The total collateral has been as low as $52,000,000—on June 15, 1938, or less than 65 per cent of the loan's principal amount, when Nicely first appraised the collateral (Sen. 592).

In the light of this testimony by B & O and RFC's own witnesses there can be no doubt that RFC has exposed

government funds to a huge and unnecessary risk. Had it insisted that the 31½ million dollars diverted by B & O in 1943 and 1944 to retiring bonds due in 1948, 1950, 1951, 1957, 1959, 1990, 1995 and the year 2000 (PX. 92, 93, pp. 2240-1) instead been applied to reduction of its loan due in 1944, the RFC would have had a loan outstanding today of only 50 million dollars. The collateral coverage would then be 300 per cent on the basis of the May, 1947 valuation above-mentioned instead of 189 per cent, and 104 per cent on the basis of the June 1938 valuation instead of only 65 per cent of the loan's face value. It is a remarkable situation where officials of a government agency entrusted with lending public monies deliberately allow its collateral position to be jeopardized from 39 to 111 per cent in order to aid the schemes of its former officials in a borrowing company. In addition, it should be remembered RFC allowed B & O to cancel 12 million dollars of first mortgage bonds on the eve of the "bankruptcy" (Sen. 687-90), thereby making them unavailable as additional collateral, which RFC had a right to demand or applying the proceeds from a sale to further reduction of the RFC debt.[11] RFC, in addition, has given up under the B & O plan its rights to demand additional collateral and its right of recourse against B & O for any loss should it sell its new bonds at a price less than their principal amount. It has abandoned its rights to demand reduction of its loan out of the huge working capital resources

11. RFC and B & O claim that the former's collateral position was improved because B & O paid off $36,510,000 of publicly-held notes out of a $50,000,000 issue due on August 1, 1944, and RFC thereby obtained a first lien on all the underlying collateral. This argument is fallacious, since RFC already held a first lien on the collateral by virtue of its ownership of the remaining $13,490,000 of the August notes, and held a second lien on the same collateral by virtue of its ownership of $72,000,000 in notes due November 8, 1944. B & O had no choice but to pay off the $36,510,000 of publicly held notes, since it had funds on hand for this purpose in addition to the 31½ million dollars of diverted monies.

built up during the war years in return for a right to be paid only $400,000 a year out of B & O earnings towards reduction of its loan. Thus by 1965, the maturity date of the new bonds, less than 10 per cent of the face amount will be retired. In other words, RFC's right to tap up to some 68 million dollars of net working capital existing at the end of 1945 and to have applied to its debt the 31½ million dollars of diverted funds has been exchanged for a right to receive a maximum of $8,000,000 in the twenty years prior to maturity of its loan in 1965. It has furthermore lost irrevocably the chance to sell out its debts or their collateral to the extent possible during the booming war-time and post-war markets. Meanwhile, the equity of the B & O stockholders under the plan is to be preserved intact and without the surrender of a single one of their contractual rights.

This then is the price the people of the United States, through their administrative officials charged with the protection of public monies, are to pay for a fraudulent bankruptcy plan whose chief motive is to maintain in office the incumbent management of the B & O, with the highest concentration of former RFC and Federal Loan Agency officials of any borrowing railroad company, as well as the largest amount of unpaid government debt. Other great railroad systems faced with maturity problems similar to B & O's, such as the Southern Railway, the Illinois Central, and the Southern Pacific paid off their huge RFC loans in full. Even companies still in Section 77, such as Missouri Pacific and Rock Island, paid off their RFC debts 100 per cent. Yet B & O equally prosperous, if not more so, and favored with special legislation in 1939, not to mention 1942, was only "able" to reduce its debt, the longest outstanding of all, by 7 per cent while 41 other RFC railroad loans were paid off in full.

G. The District Court's Decision Conflicts with the Applicable Decisions of this Court.

This Court stated in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, at page 245:

> "Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals."

If we substitute the words "B & O's sworn admissions before the Senate Committee", "B & O's creditors" and the "District Court" for "Hartford's sworn admissions", the "Patent Office" and the "Circuit Court of Appeals", the present case is seen to be an almost exact parallel of the *Hazel-Atlas* case.

In the latter case the failure of defendant's counsel to reveal that one of them had been the author of an article signed by a labor leader and which in its disguised form aided in securing defendant an exclusive patent was sufficient to vitiate an old decree based on the patent. In the present case, the B & O financial Vice President, who is also a lawyer, failed to reveal and in fact concealed by perjury his authorship of the crucial exhibit which expressed, in the court's language, "the dominant fact in the case" and led the court to believe that the exhibit had been written by the RFC's Chairman and was "without collusion" and not "inspired or stimulated" by any

B & O official. RFC collaborated in this deception of the court. In addition there have been at least some eighteen other acts of malpractice by B & O as specified above.

This case combines with the worst features of the fraud on the courts condemned in the *Hazel-Atlas* case, the fraud on the creditors attempted in *First National Bank* v. *Flershem*, 290 U. S. 504. In the *Flershem* case this court frustrated an attempt by a company to reorganize in equity as a convenient way of dealing with financial problems which it believed it foresaw. The similar character of the present reorganization is clearly indicated by the letter written on May 12, 1942 by Director Traphagen of B & O's Executive Committee in which he stated "we could probably deal with the maturing notes in 1944 and the obligations to RFC without great difficulty" and then indicated the desirability of using the 1944 maturities as the occasion for a reorganization of the creditors that would solve all the stockholders' problems without disturbance of management. In the present reorganization RFC has played and to its own injury the role of the accommodating creditor, providing by collusion with B & O's management the appearances of circumstances justifying B & O's taking refuge in the courts and their process.

The requirement that a petition in bankruptcy must be filed "in good faith" and the acceptance of a readjustment plan procured by means that are "in good faith" is integral to all modern bankruptcy statutes, including Chapter X, Chapter XV (now expired) and Section 77 of the Bankruptcy Act. This Court has never defined that requirement as a standard of conduct[12] and this case is believed to be the first one since the enactment of the modern bankruptcy statutes raising this issue in terms of

12. See footnote 3 at page 9, *supra*.

fraud and collusion. The decision of the trial court encourages a low standard of good faith and is a striking departure from the decisions of this Court condemning collusive management plans and "friendly receiverships" in *Harkin* v. *Brundage*, 276 U. S. 36, 54, 55; *National Surety Co.* v. *Coriell*, 289 U. S. 426 and in the *Flershem* case, *supra*. These decisions in the era preceding the enactment of Chapter X, Chapter XV and Section 77, set a high standard of conduct for those who seek the protection of courts in reorganization proceedings. This standard is in direct conflict with the low standard upheld by the District Court in the present case, although the modern statutes were designed to elevate bankruptcy practices above those prevailing in the previous era.

POINT II

The Court can do Substantial Justice Without Injuring any Innocent Persons.

The District Court found, although no facts were before it which enabled it so to find, having held no hearing and required no answering pleadings to the motion nor given opportunity for briefs, that a re-opening of the case would "seriously jeopardize the interests of the great body of investors settled by the decree" (Appendix, p. 79). Certainly such a crucial finding depends on proof. Since there was no evidence before the court to support this finding, it constitutes reversible error.

We concede however that, since filing of the motion the court by its delay in acting upon it and its failure to act upon an application for a stay included in petitioner's tendered show-cause order, has permitted the decree to be

consummated to such an extent as would make impracticable vacating it in entirety.[13] Practically all the new bonds contemplated by the plan have been issued and exchanged for the old bonds previously outstanding. The new issues have been actively traded. Therefore petitioner would not and does not ask recall of any of the new bonds or any change in their new maturity dates. But this does not preclude equitable relief:

> "* * * In cases where courts have exercised the power (of granting relief against judgments), the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it."
>
> *Hazel-Atlas* case, *supra,* at page 245.

In accordance with the above principle, it is apparent that an alteration of the terms of the judgment so as to restrain the present management and the stockholders as beneficiaries of the judgment from taking any benefit therefrom would be appropriate. The Executive Committee of the B & O and the other officers and directors directly or indirectly responsible for the fraud should of course be removed and a new management installed. A fair and equitable distribution of the voting power so as to give creditors representation when contingent bond interest is not paid should also be considered. Such provisions are especially appropriate since the present decree includes findings, as required by the statute, that:

13. A motion for a stay of the initial exchange of securities under the plan was filed on April 20, 1947 by other creditors who called the court's attention to disclosures by the Senate Committee. This was denied on April 21, 1947. The motion did not present any of the evidence discovered by the Senate Committee prior or subsequent to its filing but was based on newspaper stories (Sen. 755).

"(C) Neither the plan, this decree, nor any instrument to be executed pursuant hereto provides for any change in the voting rights in or control of Petitioner or the identity of or power and manner of selection of the persons who are to be directors and officers of the Petitioner upon the consummation of the plan and their respective successors. With respect to the continuation of, or any change in, the voting rights in the petitioner, control of the petitioner, and the identity of, and the power and manner of selection of the persons who are to be directors, officers, or voting trustees, if any, upon the consummation of the plan and their respective successors, the plan makes full disclosure, and, *in providing for no change in the voting rights in or control of the Petitioner, and that the identity* of and power and manner of selection *of the persons who are to be directors and officers of the Petitioner,* respectively, *will,* upon consummation of the plan, *remain unchanged* thereby, the plan is adequate, equitable, *in the best interests of creditors and stockholders of each class, and consistent with public policy.*" (Italics supplied.) (T. 1936, 1948-9.)

To allow the above findings to stand in the light of the new record would be to mock the very idea of equity.

The RFC and the other injured creditors should be allowed to make application to the Court for amendments requiring payments of surplus working capital, so far as would not be unfair or inequitable to other creditors, for reduction of their debts. Finally, the monies available for payment of dividends to stockholders, now allowed under the plan, which permits such disbursements at the present time as well as in the future despite the status of the creditors' collateral, should be diverted to reduction of debts until the injuries to creditors have been repaired.

These suggestions are, of course, no more than illustrative, but they demonstrate the power of the court to do substantial justice without injury to any persons except those who engineered the fraud and are its beneficiaries. The alternative is to sustain a decree which will hold harmless what is nothing more nor less than a plan to despoil the Government of the United States and some 80,000 other creditors of the fourth largest railroad system in the country.

CONCLUSION

The application for the writ of certiorari should be granted.

Respectfully submitted by

JOSEPH B. HYMAN,
Counsel for Petitioner.

November 14, 1947.

APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

For the District of Maryland

In the Matter of the Baltimore & Ohio Railroad Company. In Proceedings for a Railroad Adjustment under Chapter XV of the Bankruptcy Act.	No. 9905— Bankruptcy.

Order of Court Denying Motion to Vacate Decree

On March 13, 1946, a final judgment or decree was rendered in this case wherein the petition of the Baltimore & Ohio Railroad Company for reorganization under Ch. XV of the Bankruptcy Act was granted with modifications; and on June 10, 1946, the Supreme Court denied an application to review the decision, and on October 14 and October 21, 1946, the Supreme Court denied applications to reconsider its action.

On September 3, 1947, Randolph Phillips, an intervening party in the proceeding, filed a motion to vacate the decree wherein he alleged that the judgment was procured by fraud upon the court as he had contended and endeavored to prove during the hearings before the decree was entered, and that he was now in possession of newly discovered evidence of fraud unknown to him before

April, May and August, 1947, which, if known to the court in time, would have made it impossible for the court to render the decree.

The motion has been read and considered by the court and is found to be without merit for the following reasons:

(1) The motion cannot be sustained under Rule 59 (b) of the Federal Rules of Civil Procedure as a motion for a new trial on the ground of newly discovered evidence, because it was not filed either within ten days after the entry of the judgment or before the expiration of the time for an application to the Supreme Court for writ of certiorari.

(2) The motion cannot be sustained under Rule 60 (b) of the Federal Rules of Civil Procedure as a motion to relieve the intervenor from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, because the action was not made within six months after the judgment was entered.

(3) The motion cannot be sustained as a petition for leave to file a bill of review or as an independent action to relieve the intervenor from the judgment under the concluding sentence of Rule 60 (b), even if it be assumed that this court of limited jurisdiction has power to entertain such a bill of review or independent action, because, for the reasons hereinafter set out, the allegations of the motion do not constitute a sufficient basis on which a bill of review or an independent action can be sustained.

(a) The motion sets out certain specific allegations of fact purporting to show newly discovered evidence in proof

of fraud, which relate, for the most part, to questions raised during the hearing of the case and considered in the opinion, and hence these allegations merely constitute an offer of evidence which is not controlling but merely cumulative to that previously given at the hearing.

(b) All the allegations of fact in the motion, when taken together and considered in the light of the testimony taken during the hearing of the case, are insufficient to establish the charge of fraud or to justify the court in reopening the case and reviewing its decision.

(c) The intervenor has a one-third interest in $100,000 of bonds issued by the Railroad Company whose total bonded indebtedness amounted to approximately $500,000,000, or, in other words, one-third of .0002 per cent of the total indebtedness. The total number of security holders is nearly 80,000, and of this number, holders of 81 per cent of the total indebtedness affirmatively and voluntarily assented to the plan which has resulted in substantial benefits to all the security holders including the intervenor. It is obvious that without clear and sufficient reasons the court ought not to reopen the case and seriously jeopardize the interests of the great body of investors settled by the decree, which was rendered after a hearing in which all the parties were given full opportunity to offer evidence and to express their views. See *Burget* v. *Cranston,* 6 Cir., 297 F. 32, 38; *Hopkins* v. *Hebard,* 235 U. S. 287; *Ricker* v. *Powell,* 100 U. S. 104; *Purcell* v. *Miner,* 4 Wall. 513; *Thomas* v. *Brockenbrough,* 10 Wheat. 146, 151; *Wallace* v. *United States,* 2 Cir., 142 F. 2d 240; *Glade* v. *Allied Electric Products,* 7 Cir., 135 F. 2d 590; *Brady* v. *Beams,* 10 Cir., 132 F. 2d 985; *Camp-*

bell v. *Kozers,* D. C. Del., 63 F. Supp. 248; 3 Moore, Federal Practice, • • • 60.01-60.05; 19 Am. Jur. p. 302.

The motion to vacate is accordingly *denied.*

September 17, 1947.

MORRIS A. SOPER,
United States Circuit Judge.

ARMISTEAD M. DOBIE,
United States Circuit Judge.

W. CALVIN CHESTNUT,
United States District Judge.